

PACHULSKI STANG ZIEHL & JONES LLP
 Jeffrey N. Pomerantz (CA Bar No.143717)
 Ira D. Kharasch (CA Bar No. 109084)
 John A. Morris (NY Bar No. 266326)
 Gregory V. Demo (NY Bar No. 5371992)
 Hayley R. Winograd (NY Bar No. 5612569)
 10100 Santa Monica Blvd., 13th Floor
 Los Angeles, CA 90067
 Telephone: (310) 277-6910
 Facsimile: (310) 201-0760

HAYWARD PLLC
 Melissa S. Hayward
 Texas Bar No. 24044908
 MHayward@HaywardFirm.com
 Zachery Z. Annable
 Texas Bar No. 24053075
 ZAnnable@HaywardFirm.com
 10501 N. Central Expy, Ste. 106
 Dallas, Texas 75231
 Tel: (972) 755-7100
 Fax: (972) 755-7110

Counsel for Intervenor Highland Capital Management, L.P.

**IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF TEXAS
 DALLAS DIVISION**

In re:	§ Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	§ Case No. 19-34054-sgj11
Debtor.	§
	§
In re:	§
JAMES DONDERO, <i>et al.</i> ,	§
Appellants,	§
v.	§
HON. STACEY G. C. JERNIGAN.,	§ Case No. 3:21-cv-00879-K
Appellee.	§
	§

¹ The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.



1934054210521000000000022

**REPLY DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO
INTERVENE IN APPEAL OF RECUSAL ORDER**

I, John A. Morris, pursuant to 28 U.S.C. § 1746(a), under penalty of perjury, declare as follows:

1. I am an attorney in the law firm of Pachulski, Stang, Ziehl & Jones LLP, counsel to the above-referenced Debtor, and I submit this Reply Declaration in support of the *Debtor's Motion for Leave to Intervene in Appeal of Recusal Order* [Docket No. 2] (the “Motion”). I submit this Reply Declaration based on my personal knowledge and review of the documents listed below.
2. Attached as Exhibit 1 is a true and correct copy of an e-mail string between Appellants' counsel and Debtor's counsel, dated April 29, 2021 and April 30, 2021.
3. Attached as Exhibit 2 is a true and correct copy of the transcript from the hearing held on March 19, 2021.

Dated: May 21, 2021

/s/ John A. Morris
John A. Morris

EXHIBIT 1

From: Michael Lang <mlang@cwl.law>
Sent: Friday, April 30, 2021 9:35 AM
To: John A. Morris
Cc: Jeff Pomerantz; Gregory V. Demo; Hayley R. Winograd
Subject: Re: Highland: Debtor's Intervention on Appeal of Order Denying Recusal Motion

I know who you represent and I don't have an issue. You can put me down as unopposed.



Michael Lang
Crawford, Wishnew & Lang PLLC
D: +1(214)-817-4503 | M: 214-235-3986 | mlang@cwl.law
www.cwl.law
[1700 Pacific Ave., Suite 2390 Dallas, Texas 75201](http://1700PacificAve.com)



On Apr 29, 2021, at 4:53 PM, John A. Morris wrote:

Michael,

We represent the Debtor. The Debtor probably should have been identified as the Appellee, but regardless, we strongly believe we have the right to intervene.

Our request is standalone and unconditional.

Please let us know if the Appellants will agree to allow the Debtor to intervene without regard to what other parties may or may not want. If we can't reach an agreement by tomorrow, we'll simply file our motion.

Regards,
John

John A. Morris

Pachulski Stang Ziehl & Jones LLP
Direct Dial: 212.561.7760
Tel: 212.561.7700 | Fax: 212.561.7777
jmorris@pszjlaw.com
[vCard](#) | [Bio](#) | [LinkedIn](#)

Los Angeles | San Francisco | Wilmington, DE | New York | Houston

From: Michael Lang [mailto:mlang@cwl.law]
Sent: Thursday, April 29, 2021 5:31 PM
To: John A. Morris
Cc: Jeff Pomerantz; Gregory V. Demo; Hayley R. Winograd
Subject: [SUSPICIOUS MESSAGE] RE: Highland: Debtor's Intervention on Appeal of Order Denying Recusal Motion

John – Assuming that you would not oppose other parties who might also want to intervene, we would agree to Debtor intervening.



CRAWFORD
WISHNEW
LANG

Michael Lang

Crawford, Wishnew & Lang PLLC

D: +1(214)-817-4503 | M: 214-235-3986 | mlang@cwl.law

www.cwl.law

1700 Pacific Ave., Suite 2390 Dallas, Texas 75201



From: John A. Morris

Sent: Thursday, April 29, 2021 6:01 AM

To: Michael Lang

Cc: Jeff Pomerantz ; Gregory V. Demo ; Hayley R. Winograd

Subject: Highland: Debtor's Intervention on Appeal of Order Denying Recusal Motion

Mr. Lang:

As you are likely aware, we are bankruptcy counsel to Highland Capital Management, L.P. (the “Debtor”).

Please let us at your earliest convenience whether the Appellants who are appealing the Bankruptcy Court’s order (Docket No. 2083) denying the Appellants’ recusal motion (Docket No. 2062) will agree to the Debtor’s intervention in the appeal. If so, we can quickly prepare a short stipulation for your consideration.

If not, the Debtor intends to promptly move to intervene in the appeal under applicable rules and laws.

Your prompt attention is appreciated.

Regards,

John

John A. Morris

Pachulski Stang Ziehl & Jones LLP

Direct Dial: 212.561.7760

Tel: 212.561.7700 | Fax: 212.561.7777

jmorris@pszjlaw.com

[vCard](#) | [Bio](#) | [LinkedIn](#)

Los Angeles | San Francisco | Wilmington, DE | New York | Houston

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EXHIBIT 2

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:) **Case No. 19-34054-sgj-11**
HIGHLAND CAPITAL) Chapter 11
MANAGEMENT, L.P.,)
Debtor.) Dallas, Texas
) Friday, March 19, 2021
) 9:30 a.m. Docket
) MOTIONS TO STAY
) PENDING APPEAL
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

WEBEX APPEARANCES:

For the Debtor: Jeffrey Nathan Pomerantz
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

For the Debtor: John A. Morris
PACHULSKI STANG ZIEHL & JONES, LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
(212) 561-7700

For the Official Committee
of Unsecured Creditors: Matthew A. Clemente
SIDLEY AUSTIN, LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7539

1 APPEARANCES, cont'd.:

2 For Get Good Trust and Douglas S. Draper
3 Dugaboy Investment Trust: HELLER, DRAPER & HORN, LLC
650 Poydras Street, Suite 2500
New Orleans, LA 70130
(504) 299-3300

5 For Certain Funds and Davor Rukavina
6 Advisors: MUNSCH, HARDT, KOPF & HARR
500 N. Akard Street, Suite 3800
Dallas, TX 75201-6659
(214) 855-7587

8 For Certain Funds and A. Lee Hogewood, III
9 Advisors: K&L GATES, LLP
4350 Lassiter at North Hills
Avenue, Suite 300
Raleigh, NC 27609
(919) 743-7306

11 Recorded by: Michael F. Edmond, Sr.
12 UNITED STATES BANKRUPTCY COURT
13 1100 Commerce Street, 12th Floor
Dallas, TX 75242
(214) 753-2062

15 Transcribed by: Kathy Rehling
16 311 Paradise Cove
Shady Shores, TX 76208
(972) 786-3063

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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 DALLAS, TEXAS - MARCH 19, 2021 - 9:39 A.M.

2 THE COURT: We have a Highland setting on various
3 motions for stay pending appeal of the confirmation order.
4 This is Case No. 19-34054. We have four Movants, or two
5 Movants and two Joinders. Let's get appearances first from
6 those Movants. First, for the Advisors, do we have Mr.
7 Rukavina or someone from his team?

8 MR. RUKAVINA: Your Honor, good morning. Davor
9 Rukavina. I apologize, my camera is not working. IT is
10 running here to fix it. I represent NexPoint Advisors, LP and
11 Highland Capital Management Advisors, LP.

12 THE COURT: All right. Now for the -- what we call
13 the Funds, who do we have appearing? Someone from K&L Gates,
14 Mr. Hogewood, by chance?

15 MR. HOGWOOD: Good morning, Your Honor. This is Lee
16 Hogewood representing the Funds. From K&L Gates, as you said.
17 Thank you.

18 THE COURT: Okay. Thank you. All right. For the
19 joinder parties, who is representing Mr. Dondero this morning?

20 MR. TAYLOR: Good morning, Your Honor. Clay Taylor
21 appearing on behalf of Mr. Jim Dondero.

22 THE COURT: Okay. And now for the Get Good Trust and
23 the Dugaboy Trust, who do we have appearing? Do we have Mr.
24 Draper or someone?

25 MR. DRAPER: Good morning. Good morning, Your Honor.

1 Unfortunately, I was on mute. This is Douglas Draper
2 appearing for the Get Good and Dugaboy Trusts.

3 THE COURT: All right. Thank you.

4 Now for the Debtor team, who do we have appearing from the
5 Debtor team?

6 MR. POMERANTZ: Good morning, Your Honor. Jeff
7 Pomerantz; Pachulski, Stang, Ziehl & Jones; on behalf of the
8 Debtor. Several of my colleagues are on the phone, but I will
9 be handling the matter today.

10 THE COURT: Okay. Good morning.

11 For the Unsecured Creditors' Committee, who joined in the
12 Debtor's objection, who do we have appearing?

13 MR. CLEMENTE: Good morning, Your Honor. Matthew
14 Clemente, Sidley Austin, on behalf of the Official Committee
15 of Unsecured Creditors.

16 THE COURT: All right. Well, that was all of the
17 parties who filed pleadings. I know we have a lot of
18 observers this morning.

19 First, let me ask, can you hear me okay? I heard that
20 there was a little bit of sound issue with my mic. Can
21 everyone hear me okay? All right.

22 MR. CLEMENTE: Your Honor, when you first started, it
23 was fuzzy, but when you were speaking just now, it sounded
24 great.

25 THE COURT: Okay. Good.

1 All right. Well, let's talk about time estimates. I will
2 tell you, I have a hard stop today at 12:15. In a normal
3 case, we would be definitely finished, I think, in probably an
4 hour-ish. I shouldn't say normal. I should say in an average
5 case. But this case doesn't tend to be very average. So I
6 would think an hour per side, okay -- hour for the Movant and
7 Joinders and then an hour for the Debtor and Committee, so a
8 two-hour time limit -- would be reasonable. Does anyone want
9 to disagree with that?

10 All right. Well, then that's where I will limit you.

11 And let me just ask, so I kind of know going in, is it
12 going to be that the Movants have a witness or evidence to put
13 in? I saw last night the Debtors filed a witness and exhibit
14 list, but I didn't scan it this morning to see -- oh, I do see
15 that you filed, on the 17th, at least the Advisors filed a
16 witness and exhibit list.

17 So, anyway, I'll start with Mr. Rukavina. Are you all --
18 is your team going to put on evidence?

19 MR. RUKAVINA: Your Honor, our only evidence is going
20 to consist of my Docket 2043, those exhibits you referenced.
21 We reserve the right to cross-examine Mr. Seery if the Debtor
22 puts him on. But I think we envision mainly oral argument
23 today.

24 And just so Your Honor knows, my exhibits are pretty much
25 just a record of the confirmation hearing plus a few claim

1 transfer forms.

2 THE COURT: All right. Well, are there any
3 housekeeping matters before I go ahead and let the Movants
4 make their opening statement?

5 All right. Well, you may proceed. Mr. Rukavina, are you
6 going first?

7 MR. RUKAVINA: No, Your Honor. Mr. Hogewood will.
8 So I'll yield to the podium to him, with your permission.

9 THE COURT: All right. Mr. Hogewood, you may
10 proceed.

11 OPENING STATEMENT ON BEHALF OF CERTAIN FUNDS AND ADVISORS

12 MR. HOGWOOD: Thank you, Your Honor. Again, Lee
13 Hogewood with K&L Gates on behalf of the Funds.

14 As Your Honor knows, this confirmation hearing started on
15 February 2nd and continued on to February 3rd. The Debtors
16 cleverly in their objection made reference to the movie
17 *Groundhog Day*, and it seems appropriate for this case and for
18 the day when the confirmation started. We're here about six
19 weeks later asking for a stay pending appeal. Our papers have
20 gone over many of the same arguments that the Court has
21 rejected before, so in that regard it is indeed somewhat like
22 the movie *Groundhog Day*.

23 We also know that stays pending appeal are rare,
24 especially stays granted by the court that rendered the
25 decision that is to be appealed. But the Rules require us to

1 come to this first -- this Court first to request a stay in
2 the first instance.

3 The issues, I think, have been briefed, and there's no
4 point in belaboring *Groundhog Day*-type arguments any more than
5 is necessary. So I'm going to try to be relatively brief, and
6 I think the group will beat the hour that has been assigned to
7 us. We appreciate it.

8 Like injunctions, stays are the exception, not the rule,
9 and the standards are similar. Balance of harms, likelihood
10 of success, and the public interest. In 30 years of practice,
11 I have obtained three stays pending appeal. In two of those,
12 the bankruptcy judge granted the stay *sua sponte*. Judge
13 Marvin Wooten, the Western District of North Carolina, stayed
14 two decisions in the early '90s because he was confident he
15 was right, he knew he had pushed the envelope on existing
16 Fourth Circuit authority, and he knew that the appeal would be
17 moot without a stay. He turned out to be right, the Fourth
18 Circuit affirmed his decisions, and the law advanced in the
19 manner that Judge Wooten thought that it should. In the
20 other, the bankruptcy judge denied the stay and the district
21 court subsequently granted it.

22 For many reasons, most of them already identified by Your
23 Honor in earlier rulings, this is the type of case in which a
24 stay should be granted. In Your Honor's ruling on February
25 8th and in the written order, the Court made abundantly clear

1 that this Court viewed this case to be exceptional for a long
2 list of reasons detailed orally and in writing. A view of the
3 case being exceptional was part of the justification for
4 pushing the envelope on Fifth Circuit law on issues upon which
5 the Funds have based their appeal.

6 And I want to be clear: The Funds' appeal is only on the
7 issues of exculpation, injunction, and gatekeeper, in light of
8 *Pacific Lumber*. The Debtors challenged standing, and we all
9 agree that the question is are we, the Funds, a person
10 aggrieved? The Funds are aggrieved in several ways.

11 First, the Court made findings regarding a lack of
12 independence or being controlled by the so-called Dondero
13 complex. The Funds, Your Honor, receive advice from the
14 Advisors, and the Funds' boards make decisions based upon that
15 advice, after making an independent determination of whether
16 the advice is in the best interests of the Funds. The Funds
17 then expect the Advisors to implement that advice that they
18 have given, or, indeed, if the Funds disagree with the advice,
19 to implement the decision that the Funds have made.

20 It is, therefore, customary for the Advisors to take the
21 lead, including the lead in litigation matters on behalf of
22 the Funds, and the Court's conclusions of Dondero's control
23 and a lack of independence of the Funds based upon a lack of
24 participation by the Funds is not fair. The finding converts
25 customary conduct into a conspiracy of control.

1 The analogy that works for me on this, Your Honor, is a
2 lawyer analogy. If the Pachulski law firm advises the Debtor
3 to file an adversary proceeding and the Debtor's independent
4 board considers and accepts the advice and directs Pachulski
5 to do so, Pachulski files the complaints, proceeds to take
6 depositions, and moves the litigation forward. No one would
7 conclude from that conduct that Pachulski controlled the
8 Debtor or that the Debtor lacked independence from its law
9 firm.

10 The same conclusion should be reached regarding the Funds.
11 As was testified to at several hearings in this case, the
12 Funds' independent board meets regularly, and during the
13 pendency of this case, and particularly over the last several
14 months, almost weekly, if not more, to address and consider
15 advice from the Advisors and its independent counsel, a
16 partner at a law firm, not at K&L Gates.

17 These matters were testified to by Mr. Post, who is an
18 officer of the Funds, and he is also an employee of the
19 Advisors, but that does not make Mr. Post in control of the
20 Funds.

21 While the factual finding of the Court on this topic of
22 control is already on the record and some harm may have
23 already been done, a stay pending appeal of the confirmation
24 order mitigates the harm until the issue can be considered by
25 a higher court.

1 The Funds also have a different view of the investment
2 horizon for their assets, not the Debtors' assets, than is
3 possible under the Debtor's so-called asset maximization plan.
4 As part of that plan, the Debtor will be liquidating assets
5 owned by the Funds, not the Debtor, more rapidly than the
6 Funds' boards believe is in the best interests of their
7 investors. The confirmed plan creates an irreconcilable
8 conflict between the Debtor and its plan obligations and the
9 Funds and their investors.

10 Interplay between the exculpation injunction and
11 gatekeeper directly limits the Funds' contractual rights and
12 may impair their ability to take action in the best interest
13 of their holders, thousands of outside investors. The Funds
14 and their owners are aggrieved by these provisions.

15 These issues have been presented repeatedly, and the Court
16 clearly does not agree with the positions that I am stating on
17 behalf of the Funds. That said, the Court has made clear that
18 this is an exceptional case. And there is a good faith
19 argument that we are making that the plan's provisions
20 approved by the Court go well beyond what is permissible under
21 existing Fifth Circuit law.

22 Indeed, the exceptional nature of the case, at least in
23 part, the Court's -- was, at least in part, underlying the
24 Court's willingness to enter these sweeping provisions. A
25 stay pending appeal (audio gap) exceptional relief should be

1 granted in an exceptional case so that plan provisions can be
2 collectively tested.

3 In the meantime, there is little harm to the Debtor in
4 continuing to operate in Chapter 11 while the appeal proceeds,
5 particularly if the Fifth Circuit accepts the certification of
6 direct appeal from this Court.

7 These are important issues that merit a review without the
8 threat of having the appeal dismissed as moot, and this Court
9 enjoys the discretion to grant a stay pending appeal.

10 We respectfully request that you exercise that discretion
11 in light of the previously-expressed view of the exceptional
12 nature of this case. Thank you very much.

13 THE COURT: All right. Thank you.

14 Are there any other opening statements for the Movants or
15 Joining Parties?

16 MR. RUKAVINA: Your Honor, Davor Rukavina, if I may.

17 THE COURT: Okay. Go ahead.

18 OPENING STATEMENT ON BEHALF OF CERTAIN FUNDS AND ADVISORS

19 MR. RUKAVINA: Your Honor, I'll echo what Mr.
20 Hogewood said, and I hope that the Court has some sympathy for
21 us. It's a difficult position we're in, telling a court that
22 rendered an opinion, after careful thought and protracted
23 deliberation, that she's wrong, and we do respectfully and we
24 do so humbly. But like Mr. Hogewood said, we are required by
25 the Rules to come to this Court first.

1 Your Honor, on my clients' standing, we are directly
2 subject to the plan's injunctions. And I have presented Your
3 Honor case law, including the Fifth Circuit *Zale* opinion, that
4 confirms that, in and of itself, that grants us standing. And
5 that's only logical. A person subject to contempt for
6 violating an injunction has the ability to test that
7 injunction on appeal.

8 As far as the economics of the plan, my exhibits, Your
9 Honor, include four claim transfer forms that were filed two
10 days ago. I think there's one more in the works. We have
11 acquired, as part hiring various former Debtor employees, by
12 agreement, we have acquired their Class 8 claims. The Debtor
13 did object to those claims last evening, but as of now those
14 claims still exist and have not been disallowed.

15 And if Your Honor wants to talk about the law, I have a
16 case that confirms that a claim purchase, even after the entry
17 of an underlying order, grants the party, so long as they
18 acted timely, standing on the underlying order.

19 So my clients, Your Honor, now have standing not only to
20 contest the plan's injunction provisions but also the
21 underlying plan itself. And by that, I'm referring to the
22 absolute priority rule.

23 Your Honor, I have briefed that. Your Honor has rejected
24 my arguments. Your Honor has relied on a Western District
25 opinion. Those issues are what they are. I would simply

1 humbly submit that I have made a substantial case on the
2 merits on an important issue, which is, I think, what Judge
3 Jones ruled is the standard for likelihood of success on the
4 merits.

5 And it really is very simple, Your Honor. The Debtor
6 argues and this Court accepted the argument that as long as
7 equity doesn't get a penny until creditors are paid in full,
8 then the absolute priority rule is preserved as opposed to
9 being violated. And I would argue that that's not the case
10 because the Code clearly provides for the preservation or
11 grant of any property interest, any property interest at all,
12 no matter if it's worthless or highly contingent.

13 On the exculpation and injunction provision, Your Honor.
14 On exculpation, as I argued at the confirmation hearing, I
15 think that the Fifth Circuit will revisit its *Pacific Lumber*
16 opinion to allow the Court to exculpate case professionals for
17 case administration during the pendency of the case. And I
18 think Your Honor will be affirmed on that. I know some of my
19 co-counsel will disagree.

20 But the fact of the matter is that *Pacific Lumber* exists
21 today. It has yet to be overturned. So, Your Honor, we
22 believe that we have a probability of success on that issue.

23 But more importantly, the exculpation that this Court
24 approved does something that I don't think any court has
25 approved before. It exculpates prospective future post-

1 reorganization liabilities. That Your Honor I don't think can
2 do under any scenario.

3 On the injunction issue, as I argued before, if the Court
4 will have no jurisdiction to entertain the purely post-
5 confirmation action, I accept and I respect and I agree that
6 the Court has vast powers with respect to pre-confirmation
7 claims, but on the post-confirmation claims that are enjoined,
8 if the Court will have no jurisdiction to try those claims,
9 then the Court will have no jurisdiction to issue a finding
10 that the claim is colorable or not. Because if the Court
11 finds that the claim is not colorable, I'm done. There's no
12 other court I can go to. There's no mechanism that I can at
13 that point in time trigger to protect my clients' rights.

14 And Your Honor, with respect to the Debtor's arguments
15 about prior orders entered in the case, it's black letter law
16 that the Court cannot create jurisdiction and the parties
17 cannot stipulate to jurisdiction. So whatever prior orders
18 were entered in the case, and we can talk about whether they
19 were intended to apply post-confirmation or not, those prior
20 orders cannot be read as creating jurisdiction where none
21 would exist, i.e., post-confirmation.

22 Your Honor, on the Rule 2015.3 issue, it's not worth even
23 talking about today. It's a minor issue. I made it to
24 preserve the record on it.

25 I echo what Mr. Hogewood said about the Debtor not being

1 harmed. Mr. Seery has terminated or the Debtor has terminated
2 the shared services agreements. The Debtor has terminated
3 employees. The Debtor will have very little cost going
4 forward as far as administering its assets. That cost will be
5 incurred regardless of whether the plan goes effective or not.

6 The Debtor has only some six assets left to administer.
7 The Debtor, as I understand it, is in the process of already
8 trying to sell those assets. The Debtor can do that in
9 Chapter 11 or post-confirmation.

10 So, as I asked Mr. Seery at the confirmation hearing, as I
11 have briefed and as we have in the transcripts, the plan gives
12 Mr. Seery nothing that he lacks today in order to finish
13 administering this estate. By that, I mean to liquidate its
14 assets and to adjudicate its liabilities.

15 The Debtor's response to my motion did accurately raise an
16 issue that I had not fully developed, which is that, yes, the
17 Debtor will have an increased cost if it's in a Chapter 11
18 that's open because of a stay pending appeal. And the Debtor
19 -- the bond -- if the Court grants a stay pending appeal, a
20 bond should take into account that increased cost. So that's
21 the final point I have to make, Your Honor, which is that if
22 we talk about the bond, whether now or later, what I had
23 proposed initially was that okay, the creditors that would be
24 paid soon should be compensated for the time value of money.
25 That's a proposition that the Debtor appears to agree with.

1 And we know what the appropriate interest rate is. And then
2 we should include in the bond an amount for the Debtor's
3 additional burn rate for being in Chapter 11, meaning filing
4 MOTS, perhaps filing 9019 motions. But it's not \$2.2 or \$2.3
5 million per month, as the Debtor suggests. It's a far lower
6 amount. And again, we can argue about that later, depending
7 on whether the Debtor has evidence on that or not.

8 So we believe that a bond in the neighborhood of \$3 or \$4
9 million is appropriate, and that in the future, if we lose the
10 appeal, then the Court will decide what portion of that bond
11 should be forfeited, not as liquidated damages, not as the
12 price of playing poker, but as compensation for the actual
13 increased cost the estate incurred as a result of not having
14 the plan go effective.

15 Thank you, Your Honor.

16 THE COURT: All right. Thank you.

17 Do any of the Joining Parties have opening statements?

18 MR. TAYLOR: Yes, Your Honor. Clay Taylor on behalf
19 of Mr. Jim Dondero.

20 THE COURT: Okay.

21 OPENING STATEMENT ON BEHALF OF JAMES DONDERO

22 MR. TAYLOR: Your Honor, I'm not going to reiterate
23 what Mr. Hogewood and Mr. Rukavina said, but I did want to
24 address one thing that the Court has brought up before and I
25 thought it was important to address that point. And that is,

1 what is Mr. Dondero's standing and how is -- and when we're
2 talking about a stay pending appeal, how in the balancing of
3 the harms to the respective parties, how is Mr. Dondero being
4 harmed?

5 Well, Mr. Dondero has said from the beginning of this
6 case, when Mr. Seery started selling off assets with little to
7 no notice, that he wasn't getting enough value for those.
8 Okay? And the question has been raised, well, if equity was
9 never going to be reached anyway, how is Mr. Dondero harmed?
10 Well, as Your Honor has seen, and the papers have certainly
11 said, and as suits have started to be brought, alter ego
12 claims are being brought against Mr. Dondero. To the extent
13 the value, the full value of those assets are not realized,
14 which Mr. Dondero says should be higher and could be higher if
15 proper notice was given and a full auction-like process was
16 instituted, then Mr. Dondero and the Unsecured Creditors'
17 Committee or the Trust, as the case may be, if this plan goes
18 effective, is going to bring those claims for the difference
19 between what was actually recovered and what the full value of
20 the debt is. And that could run into the tens or hundreds of
21 millions of dollars.

22 So that is true irreparable harm that my client is going
23 to face if there's no stay pending appeal. And we think that
24 is a very important one. And as Mr. Rukavina just stated,
25 there's no real difference to the Debtor and Highland if it

1 runs its wind-down plan through a Chapter 11 or,
2 alternatively, under its wind-down or liquidation plan. And
3 so, therefore, that is something we wanted the Court to
4 consider.

5 THE COURT: Thank you. All right.

6 Any other openings from the Objectors? Or, I'm sorry, the
7 Movants and Joinders? Mr. Draper, anything from you?

8 MR. DRAPER: Yes, Your Honor. I have just a few
9 comments to make.

10 OPENING STATEMENT ON BEHALF OF THE GET GOOD TRUST AND DUGABOY
11 INVESTMENT TRUST

12 MR. DRAPER: The Court has looked very carefully at
13 *Pacific Lumber* and has spent an inordinate amount of time. In
14 our joinder paper, we gave the Court the citation to *Stanford*
15 -- *S.E.C. versus Stanford*, and I'd ask the Court, when you
16 look at success on the merits, to take *Pacific Lumber*, take
17 *S.E.C. v. Stanford*, and Judge Jones' decision ten years later,
18 and juxtapose that to the *Blixseth* decision that was cited by
19 Mr. Pomerantz. And you could see the Fifth Circuit view on
20 both exculpation and releases.

21 And the interesting note is *Pacific Lumber* was written by
22 Judge Jones in 2009, *S.E.C. v. Stanford* is 2019. And *S.E.C.*
23 *v. Stanford*, though it's a receivership case, looks directly
24 at the jurisdiction of a district court to grant the relief
25 that's been requested here. And I'd ask the Court to take a

1 look at that. We think success on the merits is apparent from
2 just looking at those three cases.

3 THE COURT: All right. Thank you.

4 All right. Mr. Pomerantz, opening statement?

5 MR. POMERANTZ: Yes, Your Honor. I have a fairly
6 lengthy opening statement that I was going to go through each
7 of the issues and elements in a lot more detail. I'm happy to
8 do that, Your Honor. I have a lengthy argument on standing
9 and harm and whatnot, if Your Honor believes that that would
10 +be helpful. I don't want to waste the Court's time if Your
11 Honor does not believe that would be helpful.

12 THE COURT: All right. Go ahead. I think it would
13 all be helpful.

14 MR. POMERANTZ: Okay.

15 OPENING STATEMENT ON BEHALF OF THE DEBTOR

16 MR. POMERANTZ: Your Honor, we're here yet again --
17 first of all, I'd like to admit my exhibits into evidence.
18 Again, as similar to Mr. Rukavina's exhibits, they are
19 essentially documents that are part of the court record. I
20 don't think there's any controversy regarding them.

21 Also, we do not intend to present any witnesses at the
22 hearing today.

23 THE COURT: All right. Well, shall we --

24 MR. RUKAVINA: Your Honor, if --

25 THE COURT: Yes. Shall we both just stipulate to the

1 admissibility of all of these exhibits? Are you both in a
2 position to do that?

3 MR. RUKAVINA: I am prepared to stipulate, Your
4 Honor.

5 MR. POMERANTZ: Yes, I am, Your Honor.

6 THE COURT: All right. So, --

7 MR. POMERANTZ: Thank you, Your Honor.

8 THE COURT: So, let me just be clear. The Movants'
9 collective exhibits are found at Docket Entry 2043, and it
10 looks like we have -- is it Exhibits A through M, Mr.
11 Rukavina?

12 MR. RUKAVINA: Yes, Your Honor. Exhibits A through M
13 as in Mary.

14 THE COURT: Okay.

15 MR. RUKAVINA: One of those, just so Your Honor
16 knows, has a wrong exhibit label on it, so we'll file an
17 amended that just cleans it up, but otherwise it's all in
18 there and correct.

19 THE COURT: All right. So those are admitted.

20 (Movants' Exhibits' A through M are received into
21 evidence.)

22 THE COURT: And then Debtor's exhibits are at Docket
23 Entry 2058. They are Numbers 1 through 33, correct, Mr.
24 Pomerantz?

25 MR. POMERANTZ: Your Honor, I believe it's 1 through

1 36.

2 MR. MORRIS: Substantively, it's 1 through 33, Your
3 Honor.

4 THE COURT: Okay.

5 MR. POMERANTZ: Okay.

6 THE COURT: All right. So those are admitted.

7 MR. POMERANTZ: Oh, you're right. That is correct.

8 THE COURT: Okay. Those will be admitted as well.

9 (Debtor's Exhibits 1 through 33 are received into
10 evidence.)

11 THE COURT: All right. Go ahead.

12 MR. POMERANTZ: Thank you, Your Honor. Your Honor,
13 we're here yet again to respond to a series of motions filed
14 by the Dondero entities, now in their capacity as Appellants,
15 seeking to put another roadblock in the way of the plan and
16 distributions to creditors.

17 These motions, like the various litigation involving the
18 Dondero entities that preceded them, border on the frivolous
19 and are not presented in good faith. They are being
20 prosecuted to harass the Debtor and its creditors, get them to
21 spend more money, in the hope that at some point the Debtor
22 and the creditors will accept Mr. Dondero's plan.

23 While yes, this case is exceptional, it's not exceptional
24 because of any legal issues involved. It's exceptional as to
25 the level at which a former CEO and person in control of the

1 Debtor has taken to interfere with the Debtor, its operations,
2 and a court-appointed independent board.

3 Mr. Dondero has had every opportunity throughout this case
4 to make a proposal acceptable to the Debtor and creditors to
5 buy his company back. The Court has implored him to do so on
6 many occasions, as have the Debtor and the creditors. But to
7 this point, he's refused to provide an acceptable proposal.

8 He should just acknowledge defeat and go on with the
9 remaining business ventures he has, but as we know, Your
10 Honor, that's not the Dondero way. And we are here yet again
11 spending estate resources which should really be put in
12 creditors' pockets.

13 The Court should deny the motion for several reasons.
14 First, as I will go into in some detail, the Appellants lack
15 standing to appeal the confirmation order as they cannot
16 demonstrate that they're persons aggrieved.

17 However, even if the Court determines that the Appellants
18 do have standing to appeal, they cannot satisfy the standard
19 for a stay, which, as everyone admits, is an extraordinary
20 remedy that requires the Appellants to establish each of four
21 elements. They can't demonstrate likelihood of success on the
22 merits of any of the legal issues. They haven't established
23 harm, let alone irreparable harm, from a stay. And
24 conversely, the Debtor has presented a compelling case of why
25 it and its creditors, who have been waiting for years to be

1 paid, will be harmed if the confirmation order is stayed. And
2 lastly, Your Honor, the public interest is not stayed -- is
3 not served by allowing the Dondero entities' parochial agenda
4 to get in the way of a prompt conclusion in this case.

5 Before addressing each of these issues in detail, Your
6 Honor, I did want to address an overarching issue that cuts
7 across several of the Appellants' arguments specifically as
8 they relate to the injunction and exculpation provisions.

9 Appellants argued at confirmation and they repeat the
10 arguments here in the papers and comments today that by
11 extending the exculpation and injunction provisions to matters
12 relating to implementation and consummation of the plan, the
13 Appellants are prevented from exercising their rights on the
14 post-effective-date commercial relationships that they will
15 have with the Reorganized Debtors and for pursuing claims
16 against protected parties relating to the same.

17 The argument, however, Your Honor, reflects a serious
18 misunderstanding of this language, implementation and
19 consummation. At confirmation, I informed the Court and all
20 objecting parties that the words implementation and
21 consummation did not go as far as the Appellants feared.
22 Specifically, I reminded everyone that implementation was a
23 term of art that was specifically referenced in 1123(a)(5) of
24 the Code and which provides that a plan can provide for its
25 implementation. And I described the primary means of

1 implementation under the plan that the exculpation and the
2 injunction related to, which matters are set forth in Article
3 5 of the plan and include a cancellation of equity interests,
4 the creation of new general partners and limited partner of
5 the Reorganized Debtor, a restatement of the limited
6 partnership agreement, and the establishment of the Claimant
7 Trust and the Litigation Trust.

8 The injunction prohibits efforts to interfere, among other
9 things, with those steps, and the exculpation prohibits
10 parties from asserting claims against the exculpated parties
11 relating to those activities that relate to implementation.

12 Implementation in the context of the injunction provision
13 does not mean performance under post-effective date
14 contractual relationships that the Debtor will operate after
15 the effective date. Accordingly, the argument that the
16 injunction prevents them from exercising rights under the CLO
17 agreements is just not true.

18 Similarly, Your Honor, the term consummation is not vague
19 either and does not mean what the Appellants contend.
20 Consummation is a commonly-used term and has been defined by
21 the Fifth Circuit and the Code. Section 1101(2) defines
22 substantial consummation as the transfer of assets to be
23 transferred under the plan, the assumption by the Debtor of
24 the management of all assets and property dealt with by the
25 plan, and the commencement of distributions under the plan.

1 While consummation of the plan may be broader than
2 substantial consummation, again, it does not mean preventing
3 parties from exercising their rights under post-effective date
4 commercial contracts.

5 So, again, an injunction that prohibits acts to interfere
6 with consummation of the plan and an exculpation that protects
7 exculpated parties from being sued for negligent -- for
8 actions taken in connection with consummation of the plan do
9 not have the far-reaching effects the Appellants claim in
10 their motion.

11 Your Honor, I would now like to turn to standing of the
12 Appellants to prosecute the appeals. As we all agree, under
13 Fifth Circuit law, bankruptcy appellate standing requires
14 appellants to demonstrate they are persons aggrieved. The
15 Appellants have the burden to demonstrate that they are
16 directly and adversely or pecuniarily affected by the order
17 and that their alleged injuries are not conjectural or
18 hypothetical.

19 With the clarification of the meaning of implementation
20 and consummation that I just discussed, the Appellants cannot
21 meet their burden.

22 One more overarching comment that applies to the standing
23 of all Appellants. They each argue, and Mr. Rukavina stressed
24 it today, that, because they are subject to a plan injunction,
25 that, by definition, they have appellate standing under Zale.

1 But Appellants misread Zale. In that case, the debtor
2 obtained an injunction, the stated purpose of which was to
3 prevent appellants from bringing claims against an insurer
4 relating to a global settlement in which the appellants were
5 left out. The Fifth Circuit rightfully held that where an
6 injunction specifically barred those parties from pursuing
7 their rights, they had standing to appeal. That is a far cry
8 from the standing to appeal an injunction in a plan which is
9 not party-specific but applies to the world to prevent anyone
10 from interfering with the plan.

11 If Appellants are right, then in every case where there's
12 a confirmed plan that contains an injunction, and they all do,
13 that any party in the world would have standing to appeal
14 because their rights are theoretically affected by the
15 injunction. That just isn't the law. Something more, some
16 tangible injury is required to confer standing on the
17 Appellants.

18 In addressing the standing, lack of standing, I want to
19 put the Appellants into three buckets. The first bucket are
20 Dugaboy, Get Good, and Dondero, who filed joinders to the
21 motion. None of these parties have legitimate claims in the
22 case, and the Court found at confirmation that their interests
23 were extremely remote and their objections not filed in good
24 faith.

25 None of these parties have colorable Class 8 claims or are

1 harmed by the purported violation of the absolute priority
2 rule.

3 None of these parties were harmed by the failure of the
4 Debtor to file the 2015.3 reports.

5 None of these parties have attempted to assert claims
6 against any of the exculpated parties that their concern will
7 be lost if the exculpation provision is affirmed on the
8 appeal.

9 And none of these parties have any ongoing business
10 relationships or dealings with the protected parties such that
11 the gatekeeper provision will actually have more than a
12 theoretical effect on them. Why is there the gatekeeper
13 provision in the plan? It prevents them from harassing the
14 protected parties.

15 Mr. Dondero's counsel makes a new argument today in his
16 comments, that because he is a defendant and because he will
17 be pursued, he has a vested interest in making sure the assets
18 are sold for as much as they can be sold for. If that's the
19 case, Your Honor, every defendant in every bankruptcy matter
20 would have the same argument. He hasn't presented any law,
21 and I suspect he can't, to demonstrate standing.

22 Based upon the foregoing, Your Honor, Dugaboy, the Get
23 Good Trust, and Mr. Dondero are not persons aggrieved by the
24 confirmation order, as any effect on them is only conjectural
25 or hypothetical.

1 Next, Your Honor, the Advisors. The Advisors argue,
2 without authority, that because they are purportedly harmed by
3 the plan, they can raise any infirmity with the plan, even if
4 it does not affect them. They don't cite any authority for
5 that proposition, and it doesn't make sense. In fact, the
6 2009 Southern District case of *Cypress Wood* is to the
7 contrary, where the court stated that courts across the nation
8 have determined that parties in interest may only object to
9 plan provisions that directly implicate its own rights and
10 interests.

11 If the appellate court reverses on the absolute priority
12 rule or the 1129(a)(2) issues, which it won't, the Advisors'
13 rights will not be affected at all.

14 Recognizing that the standing to appeal on the basis of a
15 perceived violation of the absolute priority rule was tenuous,
16 the Advisors attempted to manufacture standing by acquiring
17 the claims of four employees who were terminated by the Debtor
18 and now presumably work for the Advisor as one of the -- at
19 one of the Dondero companies.

20 In fact, the Debtor could, if it wanted to, object to the
21 transfers of the claims on a lack of good faith, that there is
22 case law that says you can't acquire a case -- claims for the
23 purpose of standing if it demonstrates good faith.

24 Notably, they acquired those claims on Wednesday, after --
25 long after the filing of their stay motion and after the

1 Debtor filed its opposition.

2 Putting aside acquiring -- whether -- putting aside the
3 issue of whether acquiring these claims at this juncture, when
4 none of those creditors appealed the order, none of those
5 creditors objected to confirmation of the plan, could
6 magically confer standing on the Advisors, which we say they
7 can't, the fact is these claims are not valid. The Court
8 heard testimony at various hearings, including with respect to
9 the KERP motion and plan confirmation, that the Debtor
10 intended to terminate the vast majority of its employees at or
11 soon after confirmation, and that the termination of the
12 employees prior to the vesting of their bonuses would
13 eliminate those claims for bonuses. No one ever challenged
14 that position.

15 Accordingly, since the four employees whose claims the
16 Advisors purportedly acquired were terminated, those claim
17 don't exist, and, in any event, would not be more than
18 \$40,000.

19 But Your Honor, there is more to the story, and it is
20 reflected in the objection to these and other claims which the
21 Debtor filed yesterday. It's not before Your Honor, but I
22 think it's perspective Your Honor needs to be aware of in
23 considering whether the Advisors have standing relating to
24 these claims.

25 As the Court will recall, the Debtor obtained approval of

1 a KERP program that would have entitled a number of employees
2 who were not expected to be with the Debtor long-term after
3 confirmation to a cash payment if they signed a separation
4 agreement. The employees whose claims were purportedly
5 purchased by the Advisors are four of those 54 employees.
6 None of them signed the separation agreement. As set forth in
7 our objection, we are informed and believe that Mr. Dondero
8 told them he would not hire them if they signed the agreement.
9 Rather, we're informed and believe that Mr. Dondero required
10 these employees to transfer the claims to one of his entities
11 as a condition of their continued employment.

12 But there is more. As reflected in our claims objection,
13 we have recently learned that the Debtor -- that certain of
14 the Debtor's employees, acting on their own and without any
15 approval from Mr. Seery or the independent board, changed the
16 vesting requirements for the award letters that were given to
17 employees in connection with the 2019 contingent award granted
18 in August 2020 for services rendered in 2019.

19 What did that change do? It purportedly provided that the
20 Debtor would remain on the hook for the 2019 contingent bonus
21 award even after the Debtor terminated their employment,
22 provided the employees continued to work for an affiliate.
23 And what were the specific affiliates that were identified in
24 the amendment, Your Honor? Highland Capital Management Fund
25 Advisors, NexPoint Advisors, and NexPoint Securities.

1 These changes are not enforceable against the Debtor for a
2 variety of reasons. The Debtor is continuing its
3 investigation, and wouldn't be surprised to learn that these
4 changes were orchestrated by Mr. Dondero in an attempt to
5 stick the Debtor with a continuing liability where none were
6 expected to exist.

7 Again, Your Honor, I don't raise these issues to litigate
8 them now. I realize I was testifying from the podium. They
9 will be litigated in connection with our claim objection. But
10 I raise them in the context of the standing that the
11 Appellants -- the Advisors have attempted to manufacture.

12 The Advisors also argue that they have standing to appeal
13 the injunction because it prohibits the Advisors from advising
14 or causing their clients to exercise their contractual rights
15 against the Reorganized Debtor pursuant to the CLO management
16 agreements.

17 Nothing, Your Honor, prevents the Advisors from advising
18 their clients to do anything. It's not the Advisors that have
19 commercial relationships with the Debtor under the CLO. It's
20 the Funds. And those relationships with the Funds are they
21 are investors in a fund that the Debtor manages. The Advisors
22 are simply free to provide the Funds with any advice they want
23 to.

24 Moreover, with the clarification I provided earlier, there
25 is just no merit to the argument that the injunction in the

1 plan will affect the Advisors' advice to the Funds regarding
2 the CLO agreements.

3 Advisors also say that the gatekeeper infringes on their
4 ability to assert claims post-confirmation. As it relates to
5 the CLO agreements, it's not the Advisors who have those
6 claims, theoretically, but it's the Funds. And if the
7 Advisors, as I think was indicated in a footnote in Mr.
8 Rukavina's pleadings, are concerned that the gatekeeper
9 provision impacts their ability to assert claims under the
10 remaining commercial relationships they have with the Debtor
11 with respect to shared services, that's incorrect as well.
12 The February 24th order, Your Honor, and the subsequent
13 agreement between the Advisors and the Debtor both provide
14 that the bankruptcy court has exclusive jurisdiction to
15 resolve any disputes between the parties.

16 Accordingly, it's not the gatekeeper provision that will
17 require the Advisors to litigate in bankruptcy court, but
18 rather that order and the agreement.

19 Lastly, Your Honor, are the Funds. They argue that the
20 injunction provision prevents them from seeking to terminate
21 the CLO agreements and exercising their rights thereunder, and
22 for the reasons I discussed, they're wrong. It is the January
23 9th order that prevents the termination of the Debtor as the
24 manager of the CLO agreements, and that issue is being
25 litigated in connection with a preliminary injunction hearing

1 that Your Honor will hear next week. If the Debtor wins, then
2 the Funds cannot seek to terminate the CLO management
3 agreements. If the Debtor loses, nothing in the plan will
4 prevent the Funds from exercising whatever rights they have to
5 terminate the CLO agreements, subject to all applicable
6 defenses.

7 What is impacted by the plan is the assertion of
8 affirmative claims they may have, which would have to be
9 presented to the Court under the gatekeeper provision.

10 And while it is not before the Court today, Your Honor, I
11 do want to respond to the comments in the Funds' reply and
12 also the comments made by Mr. Hogewood earlier that they are
13 not related entities under the January 9th order. As hard as
14 the Funds try, they cannot disentangle themselves from Mr.
15 Dondero. Mr. Hogewood testified at the podium. We believe
16 the testimony he gave is not consistent with the prior
17 testimony that has been given by Mr. Dondero, Mr. Post, and
18 Mr. Norris. The Funds' continuing assertions that they are
19 managed by an independent board of directors has not convinced
20 the Court that they're truly independent.

21 Your Honor has heard the testimony. Your Honor has
22 assessed credibility. And most importantly, Your Honor has
23 seen what's happened in the last few months of litigation with
24 them. None of these so-called directors have ever testified
25 to the Court, and up until these motions, the Funds and

1 Advisors have been in lockstep, asserting the same issues by
2 the same counsel with the same witnesses for Advisors. You
3 heard at the last hearing that the Funds wouldn't agree --
4 wouldn't force Mr. Dondero to do the shared service agreement
5 because they didn't -- because Mr. Dondero needed to be in the
6 -- in the facility.

7 There is no evidence that there is independence, and Mr.
8 Hogewood's comments are just not well taken.

9 And the Court found in the confirmation order that the
10 Funds are marching to the order thereon controlled by him.
11 Those findings will be entitled to great deference, and it
12 will be hard for them to be overturned on appeal. And the
13 findings are sufficient in and of themselves to cause the
14 Funds to come within the definition of related parties. But,
15 again, that's not before Your Honor today.

16 In any event, for purposes of this motion, it's clear that
17 neither the exculpation provision or the injunction provisions
18 will affect the Funds' rights after the effective date, and
19 they cannot establish standing to appeal with respect to those
20 provisions.

21 The Debtors do acknowledge that, solely with respect to
22 the gatekeeper provision, the Funds have standing to appeal
23 that issue because of the requirement that they first come to
24 the bankruptcy court before asserting claims under the CLO
25 management agreements.

1 I would now like to turn to the merits of the motions and
2 explain why the extraordinary remedy of a stay is not
3 appropriate. The Appellants cannot demonstrate that they are
4 likely to prevail on the merits of any of the issues they
5 contend the Court erroneously decided, nor do they raise
6 issues that are in serious dispute.

7 Let's first take the absolute priority rule. The Advisors
8 repeat the arguments they made at confirmation that the plan
9 violates the absolute priority rule because Class 10 and Class
10 11 interest holders can receive property after all Class 8 --
11 or that they can receive a contingent interest that is
12 property but that will only receive a distribution until after
13 all Class 8 and Class 9 creditors are paid in full with
14 interest.

15 As I mentioned previously, Your Honor, the Advisors have
16 no business making this argument because it doesn't affect
17 them, and we challenge their standing on the claims they
18 purchased. That claims acquisition was a last-minute gimmick,
19 and a poor one, for the reasons that I just went over a few
20 minutes ago.

21 On a more substantive level, though, Your Honor, the
22 argument fails now for the same reasons it did at
23 confirmation, and it hardly rises to an issue that they're
24 likely to prevail on appeal.

25 The Advisors don't cite any new case law, make any new

1 arguments. They just claim that the Court got it wrong.

2 Importantly, the Advisors have not cited any case that
3 concerned a fact pattern even remotely like the fact pattern
4 in this case, of course, other than the *Introgen* case that
5 just rejects their argument on strikingly similar facts.

6 Advisors continue to misconstrue the meaning and the
7 purpose of the absolute priority rule. The rule is meant to
8 prevent equity holders from receiving properties that senior
9 creditors are entitled to until the -- unless the senior
10 creditors consent or are paid in full.

11 The corollary to the rule which the Advisors brush aside
12 is that no creditor can receive more than a full recovery
13 based upon value determined at confirmation. The plan is
14 faithful to both those concepts.

15 First, the Debtor does not dispute that the contingent
16 interest is a property right, but that's not the end of the
17 story. The language that the Advisors conveniently omitted
18 from their brief from the Supreme Court *Ahlers* decision says
19 that a retained equity interest which would violate the
20 property -- the absolute priority rule is a property interest
21 to which the creditors are entitled before shareholders can
22 retain it for any purpose. Under the plan, the property
23 interest that the Class 10 and Class 11 creditors are
24 receiving is a springing contingent interest payable only
25 after Class 8 and Class 9 holders are paid in full.

1 That interest, the right to receive payment after
2 creditors are paid in full, is not an interest to which the
3 creditors are entitled. It is, by definition, an interest
4 that equity is entitled to after creditors are not entitled to
5 receive anything more. Class 10 and Class 11 creditors are
6 not entitled to receive anything until that time. They're not
7 the beneficiaries of the Trust. They have no right to control
8 the Claimant Trust. They can't transfer their interests.

9 As the *Introgen* court reasoned, the right is imaginary and
10 nonexistent until creditors are paid in full, plus interest,
11 as provided under the plan.

12 So, accordingly, the contingent interests held by the
13 holders of the Class 10 and Class 11 claims are not property
14 that creditors should receive under a straightforward
15 application of the absolute priority rule.

16 Moreover, the plan provided for this contingent recovery
17 to Class 10 and 11 creditors to avoid a valuation fight over
18 the value of the Debtor's litigation claims at confirmation.
19 As Your Honor is aware, the Debtor's assets consist of cash,
20 publicly-traded stocks, interests in private equity, and
21 causes of action. The Debtor had a good idea of the value of
22 the non-litigation claims as of confirmation, and those values
23 form the basis of the plan projections, which reflected that
24 Class 8 general unsecured creditors were to receive
25 approximately 70 cents on the dollar.

1 However, the Debtor did not provide at confirmation a
2 value of the litigation assets as they existed at
3 confirmation. Pursuit of those litigation assets which
4 existed at the time of confirmation at some value could result
5 in Class 8 and Class 9 creditors receiving more than a hundred
6 percent on their claims. So what? To avoid a confirmation
7 fight -- a valuation fight at confirmation where the Dondero
8 parties would have undoubtedly argued that the value at
9 confirmation of the Debtor's assets could result in payment in
10 full or more to Class 8 and Class 9 claims, thus violating the
11 absolute priority rule, the Debtor provided that any excess
12 proceeds would be paid to the Class 10 and 11 interest
13 holders.

14 Advisors brush this argument aside, claiming that debt-
15 for-equity plans that are routinely approved provide that
16 creditors may receive more than a hundred percent on their
17 claims, and they say that the Supreme Court precedent gives
18 this future upside to the creditors, not the equity holders.
19 But the Advisors, Your Honor, miss the point. The debt-for-
20 equity plans that Advisors point to give the creditors upside
21 based upon future appreciation of value. The upside that the
22 Debtor gives the Class 10 and the Class 11 interest holders is
23 the contingent upside based upon value that existed as of
24 confirmation.

25 Case law is clear that creditors cannot receive more than

1 a hundred percent of their claim based upon value at
2 confirmation, and the plan is faithful to that proposition.

3 Turning to 1129(a)(2), Your Honor, all Appellants except
4 for the Funds argue that the Court erred in confirming the
5 plan because the Debtor did not file reports required by
6 2015.3 and thus could not satisfy 1129(a)(2) of the Code
7 because the Debtor as the proponent of the plan has not
8 complied with the applicable provisions of this title.

9 Essentially, they argue that 1129(a)(2) is a strict liability
10 statute and if the Debtor has violated one provision of the
11 Code or Rules, no matter what, no matter what the context, and
12 no matter who it affects, the Court cannot confirm the plan.
13 Not raising this issue in their confirmation objections and
14 waiting until the confirmation hearing was the quintessential
15 "gotcha" moment. Had it really been a good faith objection,
16 Your Honor, they would have raised it long ago. In any event,
17 the argument fails for four reasons.

18 First, as reflected in the case law we cite in our
19 opposition, courts in this jurisdiction have held that Section
20 1129(a)(2) is geared at making sure that the debtor as plan
21 proponent complies with its disclosure obligations under
22 Section 1125 and not requiring adherence to every code section
23 and every rule.

24 Second, even if Section 1129(a)(2) is applicable, as the
25 Southern District of Texas held in the *Cyprus Wood* case, this

1 section is not a silver bullet that allows creditors to defeat
2 confirmation based upon any infraction committed by the
3 debtor. *Cypress Wood* is not an outlier, as courts around the
4 country have reached the same conclusion.

5 Third, failure to file the reports in this case, Your
6 Honor, was harmless error. As the Court knows, the Debtor
7 operates under court-approved protocols and has been
8 transparent with the Committee from the commencement of the
9 case. The Committee has substantial rights to oversee the
10 Debtor's operations, and there was just no evidence presented
11 at confirmation that the Committee hasn't received all
12 relevant information regarding the Debtor's operations, asset
13 sales, and transfers, and the value of its holdings.

14 Fourth, the cases cited by the Appellants are
15 distinguishable. None of them involved failure of a
16 confirmation because of a violation of a bankruptcy rule. In
17 each of the cases, the debtor committed multiple material
18 violations that went to the debtor's credibility, its
19 transparency with creditors, and the indifference of their
20 obligations as a debtor-in-possession. None of these cases
21 were remotely similar to the case that we have here and
22 support the denial of confirmation.

23 Next, Your Honor, I want to turn to the exculpation
24 provision. The Appellants all argue that the Court exceeded
25 its authority in approving the exculpation provision, which

1 they describe as unprecedented, far-reaching, and it tramples
2 their rights.

3 As I discussed previously, Your Honor, the concern that
4 the exculpation provision applies post-effective date to
5 business decisions is just plainly wrong. It only applies
6 post-effective date to narrow substantive issues relating to
7 implementation and consummation of the plan and do not impact
8 the ability to assert post-effective-date claims or enforce
9 post-effective-date rights under assumed contracts.

10 I know, Your Honor, that both the exculpation provisions
11 in *Pacific Lumber* and *Thru* applied to matters relating to
12 implementation and consummation of the plan. We acknowledge,
13 of course, that those exculpations were struck down for
14 reasons distinguishable for this case. However, the Court
15 found those provisions unacceptable because they applied to
16 non-debtors, not because they applied to events occurring
17 after the effective date relating to implementation or
18 consummation of the plan.

19 Putting that issue aside, Your Honor, the principal
20 argument Appellants rely -- raise is that the Court's ruling
21 is directly contrary to the Fifth Circuit's opinion in *Pacific*
22 *Lumber*. However, the Court was very careful in its ruling not
23 to run afoul of *Pacific Lumber*, and, in fact, its ruling is
24 consistent with *Pacific Lumber* and will not require any change
25 in Fifth Circuit law.

1 First, the Court relying on *Pacific Lumber's* citation to
2 the Fifth Circuit's prior decision in *Republic v. Shoaf*, the
3 Court held that the Court has already exculpated the
4 independent board, the CEO, the CRO, and their respective
5 agents, pursuant to the January 9th and July 16th orders. As
6 those orders were final, not appealed by the Court [sic], they
7 are the law of the case and conclusively establish the
8 exculpation of those parties independent of the exculpation
9 provision of the plan.

10 The Advisors argue in their reply that these orders do not
11 exculpate the parties for negligence and are only gatekeeper
12 provisions. This argument, which they make in their reply for
13 the first time, lacks any evidentiary support. Rather, the
14 uncontroverted evidence at confirmation was to the contrary.
15 Mr. Seery and Mr. Dubel, two of the three independent board
16 members, testified at confirmation that they both understood
17 that the January 9th order, and as it related to Mr. Seery the
18 July 16th order, provided exculpation for negligence in the
19 performance of their duties. They both testified that they
20 would not have undertaken their role as independent director
21 or CEO if they were not assured of exculpation.

22 Accordingly, the Advisors' argument that these orders did
23 not provide for exculpation because they didn't use the word
24 exculpation is just flat-out wrong.

25 The Advisors next argue that these orders were case

1 administration orders and were not intended to apply post-
2 confirmation. So the Advisors would have the Court believe
3 that the independent directors, who were concerned about
4 exposure to frivolous litigation in this highly-contentious
5 case, expected they would be protected from negligence and
6 have the benefit of a gatekeeper provision during the case but
7 they would be open game to be sued for anything anywhere after
8 the case was concluded.

9 That argument is preposterous and certainly doesn't find
10 any evidentiary support in the record.

11 With all due respect to Mr. Rukavina, who is a late
12 entrant into this case, he is in no position to tell the Court
13 what was or was not intended in connection with those orders.

14 Similarly, the argument that the orders must expire on
15 confirmation because the Court lacks jurisdiction thereafter
16 is illusory. The Court certainly has and retains jurisdiction
17 post-confirmation to enforce orders that it's entered during
18 the case.

19 Now, the Debtors do agree with the Appellants that the
20 January 9th and the July 16th orders do not exculpate all of
21 the exculpated parties under the plan. This is where the
22 exculpation provision comes in. The Court found that the
23 exculpation provision of the plan was consistent with *Pacific*
24 *Lumber* for two reasons.

25 Initially, since the Fifth Circuit did approve exculpation

1 for Committee members, it is clear in the Fifth Circuit that
2 there is no categorical prohibition on non-debtor
3 exculpations. The Court rightfully found that the Fifth
4 Circuit's rationale for exculpating Committees and their
5 members was equally applicable to exculpating Strand,
6 independent directors, the CEO, the CRO, and their respective
7 agents. The Court found that these parties were analogous to
8 Committee members rather than to incumbent directors and
9 officers. They came into this highly-litigious case post-
10 petition and would not have been willing to serve without
11 exculpation for negligence.

12 The Court has also found that without the protection for
13 exculpation for negligence suits from parties unhappy with
14 their performance in the case and the outcome of the case,
15 independent directors in general would be unwilling to serve
16 in highly-contentious cases in the Fifth Circuit, which would
17 be a setback for modern-day complex restructurings.

18 The Court also read *Pacific Lumber's* limited rejection of
19 exculpation provisions as resting on a key factual finding
20 that distinguished that case from this case. The Court
21 rightfully determined that exculpation is appropriate if there
22 is a showing that the costs that released parties might incur
23 defending against such suits, such as negligence, are likely
24 to swamp either the exculpated parties or the reorganization.
25 Given the substantial costs that the Debtor has had to face

1 during this case litigating with the Dondero entities, the
2 Court had no trouble finding that in this case the potential
3 for litigation and the exculpated parties could swamp the
4 reorganization, and for this reason determined that *Pacific*
5 *Lumber* supported the Court's ruling.

6 Accordingly, Your Honor, this Court's ruling on
7 exculpation provisions is entirely consistent with *Pacific*
8 *Lumber* and the Appellants are not likely to succeed on appeal.

9 Your Honor, the Appellants are also not likely to succeed
10 on appeal with respect to the appeal of the injunction
11 provision. The Appellants often conflate the injunction
12 provision with the gatekeeper provision. I will first address
13 the injunction provision, which is really the first three
14 paragraphs of Article 9(f) of the plan. The Funds argue that
15 the injunction provision prohibits actions against non-debtors
16 and is an impermissible third-party release. It is not. The
17 injunction provision applies to the Debtor and its successors,
18 the Reorganized Debtor, the Claimant Trust, and the Litigation
19 Sub-Trust.

20 The Funds argue that it enjoins claims against protected
21 parties. That's incorrect. Protected parties does not appear
22 in the first three paragraphs of Article 9(f).

23 The Advisors' main argument is that the injunction
24 provision is too broad because it prevents actions to
25 interfere with the implementation and consummation of the

1 plan, and as I said earlier, my comments should alleviate the
2 Advisors' concerns. We're not seeking to enjoin enforcement
3 of contractual rights by use of the term implementation and
4 consummation.

5 Appellants' argument that this injunction -- the
6 injunction provision here in this case is broader than the
7 injunction rejected by the district court in *Thru* is
8 misleading. The only issue in *Thru* was whether it
9 impermissibly applied to non-debtor third parties. That is
10 not the issue here, as the injunction provision only applies
11 to the Debtor and successors. *Thru* did not address whether or
12 not -- an injunction extending to matters relating to
13 implementation and consummation of the plan, as is the case we
14 have here.

15 Lastly, Your Honor, the Appellants cannot demonstrate a
16 likelihood of success with respect to the gatekeeper
17 provision. The Court's determination to approve the
18 gatekeeper provision was a mixed question of fact and law.
19 Based upon the uncontested evidence at confirmation, the
20 Court found that the Dondero entities' history of litigation,
21 both prior to this case and during the case, justified the
22 Court's approval of the gatekeeper provision.

23 The Court also heard uncontested testimony from Mr.
24 Seery that the continued threat of harassing litigation from
25 the Dondero entities would threaten success under the plan.

1 So, based upon the foregoing, the Court concluded that
2 there was an evidentiary showing as to the need for a
3 gatekeeper provision, a finding that is unlikely to get
4 overturned on appeal.

5 The Appellants raise two arguments on why the gatekeeper
6 provision is unlawful and is likely to get overturned on
7 appeal. First they argue that the Court did not have
8 authority to approve the gatekeeper provision. Second, they
9 argue that the Court will not have jurisdiction to perform the
10 gatekeeper function. Neither argument has any merit.

11 The Court relied on several provisions of the Bankruptcy
12 Code providing for a gatekeeper provision in aid of
13 implementation of the plan, including Section 105 and
14 1123(b)(6) of the Code. The Court also relied on the Fifth
15 Circuit cases of *Carroll* from 2017 and *Baum* from 2008 for the
16 authority of a court to deal with serial litigants by imposing
17 a gatekeeper provision. And as we briefed, gatekeepers are
18 not some new intervention, but have been approved by courts in
19 this district, including Judge Lynn in the *Pilgrim's Pride*
20 case and Judge Houser in *CHC Group*.

21 Similarly, Your Honor, the argument that the Court lacks
22 jurisdiction to act as the gatekeeper fails. Excuse me, Your
23 Honor. The Debtor agrees that the Court's jurisdiction is
24 more limited post-confirmation. And that may ultimately mean
25 that a court may not have authority to adjudicate each and

1 every claim relating to the post-confirmation period that
2 comes before it, but it doesn't mean that the Court cannot act
3 as a gatekeeper to determine if colorable claims exist.
4 Appellants continue to ignore the Fifth Circuit's opinion in
5 *Villegas*, where the Fifth Circuit said that a bankruptcy court
6 may act as a gatekeeper under *Barton* to determine if a claim
7 exists, even if the court will not have authority under *Stern*
8 to adjudicate that claim. That's exactly what's going on
9 here.

10 Accordingly, Appellants are not likely to prevail on
11 appeal on this issue of the propriety of the gatekeeper
12 function.

13 Next, with respect to harm, Your Honor, the Appellants
14 must demonstrate that they will suffer irreparable harm if the
15 stay is not granted. This they cannot do.

16 First, Appellants argue that, because their appeals may be
17 rendered moot without a stay, that constitutes irreparable
18 harm. This argument proves too much, Your Honor. If
19 Appellants are correct, then any party objecting to
20 confirmation of a plan that might be rendered moot without a
21 stay would be entitled to a stay, and that's not the law.

22 Your Honor presided over a case last year called *SR*
23 *Construction v. Palm Springs*, where Your Honor refused to
24 grant a stay pending appeal of an order approving a credit
25 bid. You were affirmed by the district court, which rejected

1 mootness as constituting irreparable harm, reasoning that:
2 The Court agrees with the majority of courts in the circuit,
3 finding that the risk of mooting a bankruptcy appeal standing
4 alone does not constitute irreparable harm warranting a stay.

5 Appellants' remaining arguments suffer from the same
6 misinterpretation of the language implementation of plan and
7 consummation of the plan that I have previously discussed in
8 the context of standing. Appellants are concerned that the
9 injunction will prevent them from seeking to terminate the CLO
10 agreements or exercising rights thereunder and the concern
11 that the exculpation will prohibit them from asserting post-
12 effective-date claims.

13 Preliminarily, these arguments only apply to the Funds, if
14 at all. Neither Dondero, Get Good, Dugaboy have any -- or the
15 Advisors have any post-confirmation contractual relationship
16 with the Debtor other than the ones with the Advisors which I
17 mentioned previously.

18 And as I said, while the Debtor and the Advisors were
19 parties to shared service agreements, those agreements were
20 terminated and the Court reserved exclusive jurisdiction over
21 any remaining disputes, as well as in connection with the
22 shared resource agreement that the parties have entered.

23 Nothing in the plan impacts the Advisors' ability to
24 pursue whatever rights they have under the February 24th order
25 relating to shared services or the shared resources agreement.

1 And the Funds are wrong that either the injunction
2 provision or the exculpation provision affects their right
3 under the CLO management agreements. The Funds', as I said,
4 right to terminate the CLO management agreements will be
5 determined by the existing adversary proceeding which is
6 scheduled for hearing next week.

7 Thus, the plan does not insulate the Debtor and other
8 parties from liability, which, under the applicable CLO
9 agreements, in any event, limits such claims to negligence,
10 willful misconduct, or fraud. Nor does the plan prevent the
11 Funds from exercising their contractual remedies. It just
12 prevents enjoined parties from filing an action before getting
13 court approval and allowing that action to go through the
14 gate.

15 Your Honor, turning to the harm that the Debtor and the
16 creditors will suffer, they will suffer substantial harm,
17 which basically the Appellants gloss over. They continue to
18 argue that there's no harm, there's no exit financing, the
19 Debtor can just do what it's doing, and that liquidating its
20 assets, really, no harm, no foul. However, they're wrong, and
21 the Debtor will be harmed in three significant ways.

22 First, as Mr. Seery provided uncontroverted testimony at
23 the confirmation hearing, that the value of the Debtor's
24 assets would be enhanced by eliminating the burdensome
25 restrictions the Debtor operates under in Chapter 11.

1 Second, remaining in Chapter 11 will substantially
2 increase professional fees compared to what they would be at
3 confirmation. The Committee will still exist, with their
4 complement of professionals, and the Dondero entities will
5 likely continue to object to virtually every motion, requiring
6 needless evidentiary hearings and likely more appeals.

7 Third, the creditors' rights to receive recoveries will be
8 delayed. The argument that the delay can be compensated by a
9 bond for interest at the federal judgment rate, which is less
10 than 10 basis points, is farcical. These creditors have
11 waited years, and in some cases more than a decade, to receive
12 payment. Paltry interest is hardly sufficient compensation.

13 Accordingly, the Appellants cannot come close to
14 demonstrating that the Debtor and its creditors will not be
15 harmed.

16 And lastly, Your Honor, with respect to public interest,
17 the Appellants argue that public interest is served because
18 it's necessary to respect the contractual rights of various
19 parties, protect the interests of thousands of investors,
20 prevent the Debtor from violating the securities laws, and
21 respecting and upholding precedent. Your Honor, while these
22 words sound good, they really don't apply in this case. The
23 Dondero entities are the only parties who have tried to get in
24 the way of confirmation of the plan. It is the Dondero
25 entities who are pursuing their agenda and their intent and

1 attempt to invoke the interests of innocent public retail
2 investors, none of whom have ever appeared in this case, have
3 any claims against the Debtor, or have any contractual
4 relationship with the Debtor, should ring hollow to the Court.

5 As the Yucaipa court that we cite in our materials noted,
6 in talking about the public interest, courts recognize the
7 strong need for -- public need for finality of decisions,
8 especially in bankruptcy proceedings. The public interest
9 requires bankruptcy courts to consider the good of the case as
10 a whole and not individual investment concerns. The public
11 interest cannot tolerate any scenario under which private
12 agendas can thwart the maximization of value.

13 Your Honor, the Court should not let the Dondero entities'
14 agenda get in the way of the case any more than it has already
15 done.

16 And lastly, Your Honor, with respect to the bond, if the
17 Court is inclined to grant the motions, Appellants are
18 required to post a bond to protect the Debtor from any harm
19 resulting from the imposition of the stay and the delayed
20 effective date. Appellants now agree that their initial
21 proposal of a million dollars was insufficient to cover the
22 additional costs of the case remaining in Chapter 11. Their
23 new proposal in their reply, that the amount of the bond
24 should be \$3 million -- and I think Mr. Rukavina even upped
25 that to \$4 million -- is based on the faulty premise that

1 keeping the case in Chapter 11 will only result in an increase
2 of professional fees per month of \$125,000 compared to what it
3 would be outside. Appellants don't seem to have been paying
4 attention to the significant expenses the estate has been
5 forced to incur because of Appellants' actions in the Chapter
6 11 case.

7 If the Debtor remains in Chapter 11, we'll have to seek
8 approval of a variety of actions required by the Bankruptcy
9 Code, including the monetization of assets, resolution of
10 claims, retention and compensation of professionals. And if
11 past is prologue, Your Honor, the Debtor can expect the
12 Appellants in one form or another to object to many of these
13 actions, objections which will involve discovery, an
14 evidentiary hearing, and likely appeal, expenses that will not
15 be necessary if the plan goes effective.

16 Accordingly, the argument the keeping the Chapter 11 cases
17 going at an additional monthly cost of \$125,000 while the
18 appellate process plays out is fantasy. While no one has a
19 crystal ball, Your Honor, to determine what the actual amount
20 of the costs will be, the Debtor's proposed analysis,
21 comparing average fees during the course of this case to those
22 projected post-effective date, is as good a proxy as any.
23 Therefore, Your Honor, the Debtor asks that if the Court is
24 inclined to grant the stay that the Court condition the stay
25 on the posting of a \$17.4 million bond.

1 Thank you, Your Honor.

2 THE COURT: Okay. Thank you. All right. I'll hear
3 rebuttal from the Movants.

4 MR. CLEMENTE: Your Honor, if I may? Your Honor, if
5 I may?

6 THE COURT: Oh, I'm sorry.

7 MR. CLEMENTE: Matt Clemente, Committee --

8 THE COURT: I'm sorry.

9 MR. CLEMENTE: No, no. No need to apologize.
10 Absolutely not, Your Honor.

11 THE COURT: Okay.

12 MR. CLEMENTE: I only have a minute or two, --

13 THE COURT: Okay.

14 MR. CLEMENTE: -- if Your Honor will indulge me,
15 quickly.

16 THE COURT: Go ahead.

17 OPENING STATEMENT ON BEHALF OF THE CREDITORS' COMMITTEE

18 MR. CLEMENTE: Thank you, Your Honor. Again, Matt
19 Clemente on behalf of the Committee, for the record.

20 Your Honor, you carefully considered a full record that
21 was before you at the confirmation hearing, and you rendered a
22 very thoughtful and detailed ruling and decision based on the
23 voluminous record that was before you in this case, not just
24 at the confirmation hearing but throughout the duration of
25 this case since, I believe, late 2019, when it first came in

1 front of you.

2 Nothing in the Movants' arguments, Your Honor, raises any
3 new issues that were not carefully considered by the Court in
4 a thoughtful manner.

5 So, in short, Your Honor, Mr. Pomerantz effectively
6 addressed and laid out the issues with respect to the Movants'
7 request to stay, but they have failed to meet their incredibly
8 high burden of the extraordinary remedy of giving a stay of a
9 confirmation order.

10 Your Honor, additionally, from the Creditors' perspective,
11 and Mr. Pomerantz touched very briefly on this, as Your Honor
12 knows, many of the creditors here have been waiting, sometimes
13 as long as a decade, and any delay occasioned by the stay will
14 cause further harm to those creditors, Your Honor.

15 As Your Honor knows, the plan that Your Honor confirmed
16 was heavily negotiated with the Committee, and the Committee
17 believes it will serve, among other things, to reduce costs,
18 allow for the efficient and timely distribution to creditors,
19 provide a mechanism to vindicate claims against Dondero and
20 his tentacles, and provide a detailed and carefully-
21 constructed process and procedure to allow for the
22 maximization of the assets through the monetization and the
23 pursuit of claims.

24 Your Honor, the Committee believes that going effective is
25 the way -- is in the best interest of the creditor

1 constituency, after carefully and thoughtfully considering the
2 alternatives, including languishing in bankruptcy as suggested
3 by the Movants.

4 Your Honor, I refer you to the rest of our arguments in
5 our objection and joinder that we filed, but we believe that
6 the Movants' motion for a stay should be overruled and that
7 there should be no stay granted.

8 Your Honor, that's all I had for you. If you have any
9 questions for me, I'd be happy to address them.

10 THE COURT: All right. No questions. All right.

11 MR. CLEMENTE: Thank you, Your Honor.

12 THE COURT: I'll hear anything further now from the
13 Appellants collectively. I guess I'll start with Mr.
14 Hogewood, since you went first before. Anything at this point
15 to add?

16 MR. HOGEWOOD: Yes, Your Honor. Just very briefly.
17 I believe that I heard Mr. Pomerantz acknowledge that the
18 Funds had standing on a narrow point, and standing is
19 standing, so I'll take that.

20 I don't think I testified from the podium. Rather, I
21 summarized testimony that Mr. Post and others provided during
22 the course of the confirmation hearing.

23 The gatekeeper provision goes well beyond what the Fifth
24 Circuit has previously permitted, and that is of grave concern
25 to our client, as well as the finding related to control. And

1 for those reasons, we are seeking a stay.

2 And then there was a reference to these --

3 THE COURT: Can I ask you a question? You say you
4 perceive that the gatekeeping provision goes well beyond
5 anything that the circuit has allowed. But what about my
6 colleagues in the Northern District of Texas? Do you think
7 this is broader than what retired Judge Lynn permitted in
8 *Pilgrim's Pride* or our former Chief Judge Houser allowed in
9 *CHC*?

10 MR. HOGEWOOD: Well, Your Honor, in this context, my
11 clients' contracts and the CLO contracts have been assumed,
12 and in order to exercise rights under those contracts we're
13 obligated to seek permission. And we should be able to
14 proceed under the terms of those contracts, and I don't think
15 that we can do that under the current gatekeeper provision.

16 To the extent that that is similar to gatekeeper
17 provisions decided by other bankruptcy judges, I -- it may be
18 the same, but it is -- I don't -- but it is not yet the law of
19 the Fifth Circuit, and I think that's a reason to grant a stay
20 pending appeal, to determine whether the provisions in this
21 plan are permissible within the Fifth Circuit.

22 THE COURT: Okay. Thank you.

23 MR. HOGEWOOD: The last thing I wanted to just
24 briefly touch upon is I think there was a mention that we
25 contest that we're related parties under what the January 2020

1 order. We weren't parties to that order. We did not consent
2 to it on behalf of the Funds.

3 Even if we are related parties, that prohibition relates
4 to Mr. Dondero. Mr. Dondero is prohibited from directing
5 related parties to take specific action. And I understand
6 that the Debtor disagrees that the Funds function
7 independently. The Court has made findings on that subject,
8 that they do not function independently. But that is one of
9 the main reasons for which we are seeking both a stay and are
10 pursuing this appeal, to ask the appellate court to correct
11 those conclusions.

12 So, with that, Your Honor, we ask you to stay the
13 confirmation order pending appeal, and I have nothing further.
14 Thank you.

15 THE COURT: All right. Thank you. Mr. Rukavina?

16 MR. RUKAVINA: Your Honor, thank you. And I'll be
17 brief.

18 On this employee claim transfer issue, Your Honor, when
19 those issues come up before you, you'll see that the employees
20 transferred their claims in late February or early March.
21 They did so because my clients basically gave them the years
22 of credit for seniority that they had at the Debtor with
23 respect to our bonus plans. In other words, we're trying to
24 make good what they lost with the Debtor. And in exchange,
25 they assigned their claims to us.

1 The reason why I didn't file the 3001 notices until
2 yesterday is because it wasn't until Friday night that the
3 Debtor challenged my standing, even though the Court found I
4 had standing at the confirmation. So I got the employees as
5 fast as I could.

6 In other words, nothing to do with that had anything to do
7 with engineering standing, and I question why Mr. Pomerantz
8 would have a good faith basis for saying that.

9 As far as what I heard for the first time today, that some
10 employees tampered with the books and records of the Debtor, I
11 have no idea what the Debtor is talking about. I'm sure it'll
12 come out in due course. But I hope that there's a good faith
13 evidentiary basis for having made those statements.

14 Your Honor, if we look at -- and Your Honor doesn't have
15 to pull it up; I'm not suggesting that you do -- but it's in
16 the record. On Page 198 of the first day's confirmation
17 trial, I asked Mr. Seery about the injunctions and I asked,
18 and I'm quoting now, "Do I understand correctly that this
19 provision we've just read means that, upon the assumption of
20 these CLO management agreements, if the counterparties to
21 those agreements want to take any action against the
22 Reorganized Debtor, they first have to go through this
23 channeling injunction?" Mr. Seery answers, "I believe that's
24 what it says, yes."

25 And now, to paraphrase, I continue asking him, and I say,

1 "Because the wind-down of the business of the Reorganized
2 Debtor will include the management of these assets?" And he
3 says yes.

4 And also, very briefly, on Page 206 of that same
5 transcript, and I'm paraphrasing now, I asked Mr. Seery to
6 tell me what the interference with the implementation or
7 consummation of the plan means, and he answers, now I'm
8 quoting, "That it means in some way taking any actions to
9 upset, disrupt, stop, or otherwise prohibit or hurt the estate
10 from implementing or consummating the plan." Then I ask, "Is
11 this intended to be very broad?" And he says yes. Then I ask
12 him to be more specific, Your Honor. Mr. Morris objects based
13 on form, and the Court sustains that objection before I may
14 respond to it.

15 So I hope the Court will forgive us for being very
16 concerned about these injunctions, especially when, in the
17 last two months, we had a mandatory injunction hearing before
18 Your Honor where the Debtor alleged massive, massive
19 irreparable injury, just to concede that its request was moot,
20 and based on tortious interference we had a hearing in January
21 where the Debtor admitted that it closed its sales, there was
22 no interference, and all that happened was that our employees,
23 our employees, refused to do something that Mr. Seery
24 requested.

25 So when I hear Mr. Pomerantz say, whoa, whoa, whoa, these

1 are actually very narrow provisions, Mr. Rukavina is not smart
2 enough to understand what I'm saying, then I would suggest,
3 Your Honor, that the Debtor do a plan modification and moot a
4 lot of our objections. If Mr. Pomerantz's view of these
5 injunctions as being narrow is true, notwithstanding what Mr.
6 Seery testified to, then that's the proper remedy. Let's
7 amend the plan by agreement, and if they want to moot ninety
8 percent of our arguments, we'd be happy to do that.

9 We don't want to appeal. We don't want a stay pending
10 appeal. We just don't want contempt in front of Your Honor
11 four months from now because something that we do in good
12 faith is brought before Your Honor as something nefarious
13 because apparently we're all Dondero tentacles.

14 Your Honor, as far as the Debtor collaterally attacking
15 its own confirmation order, now saying that, well, creditors
16 might receive a hundred percent, on Page 41 the Court finds
17 it's 71 percent, so I think that argument carries no weight.

18 And finally, Your Honor, I just want to leave you with one
19 parting thought, because I think -- I think it is important.
20 The Debtor has argued that we are all disrupters, that we are
21 trying to help Mr. Dondero burn down the house. The Court, to
22 one degree or another, seems to have accepted that view. What
23 we have tried to tell Your Honor, at least the Advisors and
24 the Funds, what we have tried to tell Your Honor is that there
25 is a business dispute underlying all of this, a good faith

1 business dispute. The Debtor is liquidating assets worth more
2 than a billion dollars in a manner that we'd rather the Debtor
3 not do.

4 Now, the Court can decide whether the Debtor has the power
5 to do so. It's a legitimate business dispute. I can see both
6 sides of it. But it is that businesses dispute that is
7 driving this appeal and this stay pending appeal.

8 I heard Mr. Pomerantz say that if the Chapter 11 case
9 remains open, the Debtor will have to go to the Court to
10 approve sales, et cetera. That's what we've been asking for
11 for months now. We would love it if the Debtor did that, to
12 -- in open, with transparency, with bid procedures, to sell
13 these remaining assets. Because, well, not my clients
14 directly, but Mr. Hogewood's clients, and my clients
15 indirectly, own those interests in those assets. But the
16 Debtor has never taken that position before. The Debtor has
17 said that it gets to liquidate these assets without authority
18 of the Court.

19 So if the price of a stay pending appeal is to have the
20 Debtor have to come to the Court with approved sale processes
21 and bid procedures, how can anyone complain about that? We
22 will fund that stay pending appeal bond, as long as it's
23 reasonable, any day of the week, because that's all that we've
24 been asking for, that the Debtor not liquidate quickly and for
25 less than appropriate value the assets that it has remaining

1 because it fundamentally conflicts with the rights of the
2 underlying interest holders.

3 Thank you, Your Honor.

4 THE COURT: All right. Anyone else? Mr. Taylor?

5 MR. TAYLOR: Yes, Your Honor.

6 THE COURT: Uh-huh.

7 MR. TAYLOR: Yes, Your Honor. Clay Taylor on behalf
8 of Mr. Dondero.

9 THE COURT: Okay.

10 MR. TAYLOR: To echo a little bit of what Mr.
11 Rukavina said, and I heard Mr. Pomerantz say they will have
12 significant expenses getting court approval inside a Chapter
13 11, including getting permission for asset sales. One, I'm
14 very encouraged to hear that they have now admitted the errors
15 of their way and that they should have gotten permission for
16 asset sales. It didn't happen before. But if we could just
17 get adequate notice, either inside or outside of Chapter 11,
18 that's what Mr. Dondero wants.

19 He wants the opportunity to bid in an open market for
20 these assets or bring other bidders to the table. He wants to
21 increase value. He fundamentally disagrees with Mr. Seery.
22 And, you know, it's okay to have a disagreement on a business
23 issue as to whether this is the best way to liquidate these
24 assets. He wants to see if value could ever get in a
25 waterfall down to Mr. Dondero. He wants to limit his

1 liability or any of those entities in which he owns or are a
2 part of liability to the investors that they're holding their
3 money. He wants to limit his potential liability for which
4 these alleged alter ego claims are being brought and they say
5 he is going to be liable for the difference in value. He also
6 wants to make sure he preserves his reputation in the
7 marketplace as having been a savvy investor.

8 So these are exactly the fundamental things that we're
9 asking for that weren't done before. That's why we're asking
10 for a stay pending appeal, so they actually either, one, have
11 to provide the proper notice as required under the Code and
12 Procedures, or alternatively, if they don't, that they can be
13 held liable for their actions, without the exculpation and
14 release and that we go through a gatekeeper process.

15 That is fundamentally the difference that we have and why
16 we're asking for a stay pending appeal and why I try to state
17 that succinctly and let Your Honor consider that. Thank you,
18 Your Honor.

19 THE COURT: All right. Thank you. Mr. Draper,
20 anything further from you?

21 MR. DRAPER: I have a small comment. Your Honor,
22 look, you and I completely disagree on *Pacific Lumber* and its
23 impact. You spent a great deal of time looking at it and, you
24 know, you have your opinion and the Fifth Circuit will have
25 its opinion, since we're going through a direct appeal.

1 The one point I would like to make is that I've never seen
2 a *de minimis* limitation on somebody being a party in interest.
3 I think that does not exist in the Bankruptcy Code. I
4 disagree that I have a *de minimis* interest, but I don't think
5 that takes somebody away from being a party in interest or
6 being affected by an order, and there's no case that stands
7 for that proposition.

8 So, with that, I have nothing further to say, Your Honor.

9 THE COURT: All right. Thank you.

10 MR. POMERANTZ: Your Honor, may I briefly respond?
11 This is Jeff Pomerantz.

12 THE COURT: Well, no, we -- I usually let the movants
13 have the last word, so I think we're done.

14 MR. POMERANTZ: Okay.

15 THE COURT: All right.

16 MR. POMERANTZ: Thank you, Your Honor.

17 THE COURT: My clock shows 11:06. I am going to take
18 a break to collect my thoughts and look at these exhibits.
19 And I'll tell you what. We'll come back in 30 minutes, at
20 11:36, and I'll give you my ruling.

21 We also have a few housekeeping matters, a couple of
22 housekeeping matters that I want to address when we come back.
23 You know, we have this hearing Monday on the contempt motion
24 as to Mr. Dondero, and I just want to see where things are
25 with the Fifth Circuit *mandamus* effort that Mr. Dondero is

1 pursuing. I don't know if you all will have any updates when
2 I get back.

3 And then I hear that a motion for my recusal has been
4 filed by Dondero through new counsel. When was that, Nate?
5 Was that last night? Okay. Anyway.

6 THE CLERK: It was last night.

7 THE COURT: It was last night. So I'll just comment
8 on that when I come back as well. So, I'll see you in 30
9 minutes.

10 THE CLERK: All rise.

11 (A recess ensued from 11:07 a.m. to 11:54 a.m.)

12 THE CLERK: All rise.

13 THE COURT: All right. Please be seated. All right.
14 We are going back on the record in the Highland motion for
15 stay pending appeal. The Court deliberated a little longer
16 than I told you I would, but the Court is ready to make a
17 record. Is everyone out there? Hopefully, we have everyone
18 out there that we need.

19 All right. Mike, can you tell, everyone is still logged
20 in?

21 THE CLERK: Yes, ma'am, they are.

22 THE COURT: Okay. All right. The Court has decided
23 to deny the motions for stay pending appeal of the
24 confirmation order.

25 First, as we all know very well, courts in this circuit

1 have held that a discretionary stay pending appeal of a
2 bankruptcy court order should only be granted if a movant
3 demonstrates the traditional four prongs: (1) a likelihood of
4 success on the merits; (2) some irreparable injury if the stay
5 is not granted; (3) the granting of the stay would not
6 substantially harm other parties; and (4) the granting of the
7 stay would serve the public interest. Many Fifth Circuit
8 cases have articulated these standards, including *In re First*
9 *South Savings Association*, 820 F.2d 700 (5th Cir. 1987) and
10 *Ruiz v. Estelle*, 666 F.2d 854.

11 The Fifth Circuit has also made very clear the party
12 seeking a stay pending appeal bears the burden of proof on
13 each of these elements. The Court has said that while each of
14 these four factors must be met, the movant need not always
15 show a probability of success on the merits when a serious
16 legal question is involved. The Court, the Fifth Circuit, has
17 hastened to add that this is not a *coup de grâce* for movants;
18 still there are the other three prongs that have to be met.

19 So, I also want to add a reference to Judge Marvin Isgur.
20 My Southern District of Texas colleague wrote at length on
21 this issue in a *TNT Procurement* decision in denying a request
22 for a stay pending appeal as to three different orders he had
23 entered during that Chapter 11 case. In that case, he held
24 that although the movant had met its burden of proof on the
25 first factor, likelihood of success on the merits as to some

1 of the legal issues in the challenged orders, that with regard
2 to the second factor, irreparable injury, the presence of
3 irreparable injury is a fact issue, and the movant requesting
4 a stay pending appeal must prove such fact by a preponderance
5 of the evidence. And Judge Isgur held that because the movant
6 failed to present any evidence on this prong at the hearing,
7 there could be no proof of irreparable injury. So he denied a
8 stay pending appeal.

9 So, turning to the facts and arguments here, first, before
10 addressing the four prongs, the four traditional factors for
11 evaluating a request for a stay pending appeal, I'm going to
12 address the standing challenge that the Debtor has made as to
13 the four Appellants. I determine there is standing, just as I
14 did at the confirmation hearing, although I really want to
15 reiterate we have a very close call on this standing argument.
16 Clearly, we do not have traditional creditors here appealing a
17 plan. In fact, notably, we have an Official Unsecured
18 Creditors' Committee with large strong creditors as members
19 who have fought long and hard with this Debtor, both before
20 the case in many years of litigation and during the case, and
21 they've embraced the plan.

22 The four Objectors, the Court continues to believe, are
23 following the marching orders of Mr. Dondero, the company's
24 former CEO, and are *de facto* controlled by him, based on prior
25 evidence this Court has heard.

1 In any event, the Court determines that these four
2 Appellants, these four categories of Appellants, do have some
3 plausible argument of being persons aggrieved or affected by
4 the confirmation order, remote as that interest is by
5 traditional Chapter 11 standards. And so, thus, I find they
6 have standing.

7 Again, for the benefit of courts hearing an appeal on this
8 or further considering a motion for stay pending appeal, I
9 stress that this bankruptcy judge has a very hard view on
10 this. It's an extremely close call. Again, these Appellants
11 are not conventional creditors affected by plan class
12 treatment, or direct interest holders, for that matter. So
13 it's a hard call.

14 But, having found technical standing, the Court turns to
15 the evidence here with regard to the four-factor test for a
16 stay pending appeal. And we had no witnesses. We had merely
17 documentary evidence and argument. The Court finds and
18 concludes that this documentary evidence and argument did not
19 meet the burden of proof necessary to justify a discretionary
20 stay pending appeal.

21 On the first factor, likelihood of success on the merits,
22 there was at least a serious legal question raised. There
23 were, of course, three primary legal issues raised as errors
24 by this Court in the confirmation order. The first two
25 arguments were not pressed too much in legal argument today,

1 although they were stressed in the briefing. One, the
2 absolute priority rule violation argument; and then, two, the
3 Bankruptcy Rule 2015.3/Bankruptcy Code Section 1129(a) (2)
4 violation argument.

5 The Court considered these arguments to wholly lack merit,
6 and are borderline frivolous, frankly. They do not raise a
7 serious legal question.

8 The question of the propriety of the exculpations, the
9 plan injunctions, and the gatekeeping provisions are a harder
10 call. While this Court strived mightily to understand the
11 parameters, the dictates, the exceptions of *Pacific Lumber* as
12 to the exculpations, the Court acknowledges others may
13 reasonably disagree that I interpreted *Pacific Lumber*
14 correctly as to when the Fifth Circuit might extend its policy
15 rationales for exculpations or whether it might extend the
16 holding of *Pacific Lumber* or elaborate on the holding of
17 *Pacific Lumber* when there's a situation like this one where we
18 have an independent CEO and board members who are more like
19 Official Unsecured Creditors' Committee members than typical
20 incumbent officers and directors, and also, in an exceptional
21 situation like this case, where there's a real risk, a real
22 risk of burdensome and vexatious litigation going forward if
23 we don't have in place the exculpations, the injunctions, and
24 the gatekeeping provisions.

25 I think there are also *res judicata* issues that cannot be

1 ignored with regard to the prior January and July 2020 orders
2 that contained similar provisions to the exculpation
3 provisions and gatekeeping provisions.

4 In any event, I'm going to spot the Appellants on this
5 one, to use a slang term, the spot being that they have raised
6 a serious legal question as to the exculpations, gatekeeping
7 provisions, and plan injunctions, although I stress that I
8 think pushing the envelope, to use that phraseology, is a bit
9 of hyperbole certainly in connection with plan injunctions,
10 which are very common in Chapter 11 plans, and even the
11 gatekeeping provisions, which retired Judge Lynn and retired
12 Chief Judge Houser have approved in very significant large
13 Chapter 11 cases.

14 But turning now to the other three prongs, the Appellants
15 have not met their burden of proof. They simply have not
16 shown they will suffer irreparable harm, certainly not because
17 of a mere mootness risk, and that's really the only harm that
18 I truly think has been plausibly presented or argued here by
19 Appellants.

20 They cannot show there will not be substantial harm to the
21 overall bankruptcy estate, when it undeniably will endure more
22 administrative costs and burdens if the Debtor continues on as
23 a debtor-in-possession in an already very lengthy case, by
24 today's measure. A 15-month case in today's world is a long
25 Chapter 11 case.

1 And the Court believes there will be a substantial harm to
2 the legitimate creditors here, the creditors who have faced
3 nothing but delay in pursuing their claims for years and
4 years, some for decades now.

5 And as far as the public interest factor, I do agree with
6 one comment made today that this is more about Mr. Dondero's
7 private agenda to get his company back, the company that he
8 decided to file Chapter 11 back in October 2019, more than
9 about protection of the public interest or the interests of
10 retail investors that he or the Advisors or Funds purport to
11 be acting to protect.

12 So the discretionary stay is denied.

13 As to the possibility of a stay pursuant to a bond being
14 posted, we used to have a local district court rule that I
15 believe was repealed a few years ago. But even if it's still
16 around, it's not terribly apropos for a confirmation order.
17 It was Local District Rule 62.1, dealing with a supersedeas
18 bond. It provided, unless otherwise ordered by a presiding
19 judge, a supersedeas bond staying execution of a money
20 judgment shall be in the amount of judgment plus twenty
21 percent of that amount to cover interest and any award of
22 damages for delay, plus \$250 to cover costs. Certainly, that
23 would be a very large number here. And I don't entirely agree
24 with retired Judge Richard Schmidt, who, in the ASARCO case,
25 said the entire amount of the indebtedness under a plan is the

1 appropriate amount for a bond.

2 So, what I will do here is I will accept the Debtor's
3 suggestion of \$17.4 million as an appropriate amount of the
4 bond based on the argument made in its pleadings and today. I
5 will tell you I frankly think it's a little on the low side,
6 but I will accept it as reasonable since the Debtor has, I
7 guess, looked into this deeply and decided that would be
8 reasonable.

9 So, if the Appellants are willing to post a \$17.4 million
10 bond, the Court will grant the stay pending appeal.

11 All right. Well, as I said, I have a hard stop at 12:15,
12 so I'm going to ask --

13 MR. POMERANTZ: Your Honor, this is Jeff Pomerantz.
14 I just had one comment on your last comment.

15 THE COURT: Okay.

16 MR. POMERANTZ: My presentation to the Court was not
17 to say that they should get a stay if they posted the
18 bond. My comment to the Court and argument to the Court is
19 they have not met the standard, but even if they had met the
20 standard, they still need to post a bond. So it was only in
21 the event that you found that they had satisfied their
22 standard. So the Debtor's view is that there should not be
23 any stay, regardless of whether they post a bond or not.

24 As I indicated in my argument and we indicate in our
25 pleadings, one of our arguments that we did not quantify, and

1 I suspect we would have quantified if there would have been an
2 evidentiary hearing on the bond, is the effect on the asset
3 sale based upon Mr. Seery's testimony at confirmation.

4 So we don't think that the Appellants should have a right
5 to a bond. They don't have a right to a bond. And I just
6 wanted to make sure that Your Honor didn't misconstrue my
7 comments differently.

8 THE COURT: All right. Well, I think I did
9 misconstrue your argument. I mean, my understanding of the
10 case law is the courts of appeal view this as there's a
11 discretionary stay where the Court has the discretion to grant
12 a stay pending appeal. And, you know, it's kind of
13 unfortunate they use that term "discretionary," because there
14 is a strict four-prong test that has to be met. But if the
15 Appellants are willing to put up an appropriate dollar amount
16 as far as a bond, then I don't have discretion. You know, I
17 don't even go through the four-prong analysis.

18 So, you're telling me you think I got the case law wrong
19 on that?

20 MR. POMERANTZ: Your Honor, I didn't read the
21 briefing by the Appellants to suggest that. I certainly
22 didn't read -- you know, present that to the Court in our
23 arguments. I don't know if that's the law.

24 Your Honor, I fully expected that since -- look, a lot of
25 what was presented on the amount of the bond was not evidence,

1 right? We presented exhibits. The Appellants presented
2 exhibits.

3 If Your Honor is inclined to view it that way, I guess (a)
4 I would like the opportunity to brief it; and (b) present
5 evidence to Your Honor that the damage is in excess based upon
6 the argument we made on the potential adverse impact to the
7 sale of assets, as Mr. Seery testified on an uncontroverted
8 basis at the confirmation hearing.

9 MR. RUKAVINA: Well, Your Honor, may I briefly
10 interject?

11 THE COURT: Briefly.

12 MR. RUKAVINA: Your Honor, this was our evidentiary
13 hearing, and just like the Court ruled against us based on the
14 evidence on the discretionary stay, Mr. Pomerantz had his
15 chance, the Court has adopted a \$17.4 million number, we're
16 going to try our best to get that bond in place ASAP.

17 If the Court is inclined to consider post-hearing matters,
18 I would ask for a short administrative stay of the effective
19 date of the plan so that we're not prejudiced by that, because
20 otherwise we're kind of in limbo.

21 MR. CLEMENTE: And Your Honor, if I may, it's Matt
22 Clemente on behalf of the Committee.

23 THE COURT: Uh-huh.

24 MR. CLEMENTE: I agree with Mr. Pomerantz's comments.
25 I don't believe -- at least, I didn't appreciate that today

1 would be an evidentiary hearing over the size of the bond. I
2 understood the pleadings to read that there was a stay that
3 was being requested by the Court [sic], and if the Court
4 should otherwise determine that, based on the law, the stay
5 was required -- which I believe, based on Your Honor's ruling,
6 you did not believe it met the standard -- then there would be
7 a discussion of a bond.

8 So the Committee would like to offer evidence in
9 connection with the Debtor, if appropriate, to the extent that
10 Your Honor is suggesting that the size of a bond would then
11 result in a stay as a matter of right on behalf of the
12 Appellants, or the potential Appellants.

13 Thank you, Your Honor.

14 THE COURT: All right. Well, it was your burden,
15 your -- Appellants -- burden to show -- and, again, I think
16 I'm inclined to allow a little -- well, again, my
17 understanding of the law is I have to grant a stay pending
18 appeal if a sufficient bond is put up. You know, forget about
19 the four prongs if a sufficient bond is put up.

20 I did not find the \$1 million that increased to \$3 or \$4
21 million, whatever the number was, was sufficient.

22 It occurs to me that we really didn't tee up -- we really
23 didn't tee up what was the size of the appropriate amount of
24 bond, now that I think about it. It was all about the
25 discretionary stay, with that just kind of thrown in.

1 So here is what I will do. I'll deny the motion before
2 me, but it is certainly with leave for us to have a follow-up
3 hearing on a bond amount. Okay? I mean, Mr. Rukavina makes a
4 fair point that he ought to get a small stay, small, a stay
5 between the time we come back -- between today and the time we
6 come back for him to argue about the appropriate bond amount.
7 So -- I'm running into my hard stop -- we'll talk about that
8 hearing date in a moment, but let's talk about what we have
9 set next week. We have the motion to hold Mr. Dondero in
10 contempt related to the alleged violations of the preliminary
11 injunction and TRO. Is there any update from the Fifth
12 Circuit on the *mandamus* request?

13 MR. TAYLOR: Your Honor, this is Clay Taylor on
14 behalf of Mr. Dondero.

15 My understanding of that is that briefing was requested by
16 the Fifth Circuit of --

17 THE COURT: It was due the 16th.

18 MR. TAYLOR: -- the Debtor -- by the Debtor.

19 THE COURT: Yes. It was due the 16th.

20 MR. TAYLOR: You're correct. And that was filed.
21 And it is under consideration by the Fifth Circuit. And
22 beyond that, I mean, of course, I wish I could tell you when
23 they're going to rule, but I can't. So I don't think anybody
24 has any other update other than that.

25 THE COURT: All right. So we'll go forward Monday at

1 9:30 unless someone notifies my courtroom deputy over the
2 weekend that the Fifth Circuit has said stop, you can't.

3 All right. Okay. And then there's -- I don't know if the
4 apparently new counsel who has filed a motion of recusal is on
5 the line, but I'll just tell people I will let you all know by
6 the end of today if I think I need a hearing on that or I
7 think I need to give other parties in interest the opportunity
8 to weigh in on that. But I don't think it's going to stop me
9 from going forward, just based on the very quick summary I got
10 from one of my law clerks this morning. But I'll let you know
11 by the end of the day today if I think I need to set that for
12 hearing or need responsive pleadings.

13 All right. The last thing before I'm late for my
14 engagement is, Mr. Pomerantz, at some point -- no, this is the
15 next-to-last thing. At some point, you said we have a hearing
16 next week on a preliminary injunction adversary as to the
17 Funds. Is that next week?

18 MR. POMERANTZ: Your Honor, I may have misspoke. I
19 think it's the 29th.

20 THE COURT: Okay.

21 MR. POMERANTZ: I could be corrected if I'm wrong.
22 So, --

23 THE COURT: Okay. So, with that, I'm going to offer
24 you this. Traci, correct me if I'm wrong: I don't think we
25 have anything set right now on Wednesday of next week,

1 correct?

2 THE CLERK: That is correct.

3 THE COURT: Okay. I will offer you Wednesday to come
4 back on the bond issue. And then, if that's the case, --

5 THE CLERK: That's --

6 THE COURT: -- then I'll give a temporary stay
7 through 11:59 next Wednesday on implementing the plan to give
8 the Appellants the opportunity to put on their argument and
9 evidence and for the other parties to put on their argument
10 and evidence about what is an appropriate bond amount. Does
11 that work?

12 MR. RUKAVINA: Your Honor, very quickly, our
13 agreement in principle with the Debtor was that we'd have a
14 week after a hearing on a temporary stay. I would urge Your
15 Honor to give us that after next Wednesday. Otherwise, we're
16 going to have to go to district court immediately. I don't
17 know if Mr. Pomerantz is agreeable to that.

18 MR. POMERANTZ: Yes, Your Honor. We're prepared to
19 give a week from the hearing, as our prior agreement was with
20 Mr. Rukavina.

21 THE COURT: Okay.

22 MR. POMERANTZ: I would also suggest that, with
23 respect to the hearing next Wednesday, number one, that by the
24 end of the day today -- and it could be late evening -- that
25 parties at least file their witness lists for who would be a

1 witness at that hearing and that Your Honor set a joint
2 deadline for any briefs, which would primarily be on the legal
3 issue, for 3:00 p.m. Central time on Tuesday, so that Your
4 Honor will have time to review them before the hearing and
5 that we can at least see each other's legal position on
6 whether a stay is appropriate even without meeting the
7 standard in -- if there's a bond posted.

8 THE COURT: All right. Well, sounds reasonable to
9 me, since we're talking about such a specific narrow issue.
10 Is everyone good with those deadlines?

11 MR. RUKAVINA: Your Honor, yes, and I know Your Honor
12 has to run. I will not be available for Wednesday, so please
13 excuse me. I'll have someone else handle it.

14 And I would just ask that in the order denying the
15 discretionary stay, or some order, that the effective date of
16 the plan be pushed out by said week so we have it on paper and
17 clarity. Thank you, Your Honor.

18 THE COURT: All right. That sounds reasonable, Mr.
19 Pomerantz. Okay.

20 MR. POMERANTZ: Thank you, Your Honor. I guess the
21 only addition to my -- what I -- on Tuesday, when people file
22 their briefs, they should also file whatever exhibits they
23 would be relying on Wednesday. Today, with the witness, I
24 realize it's a little probably early for people to get all
25 their exhibits, but they should be able to get their witnesses

1 by today and then their exhibits by 3:00 p.m. Central Tuesday,
2 along with any briefs.

3 THE COURT: Okay. So that sounds reasonable. By the
4 end of today, the witness and exhibit list, or did we just
5 want to say witness --

6 MR. POMERANTZ: The witness list by the end of today.

7 THE COURT: Just the witness list.

8 MR. POMERANTZ: Just the witness list.

9 THE COURT: 3:00 p.m. Central time Tuesday for the
10 exhibit list, with exhibits filed, and any briefing. Anyone
11 have any contrary views?

12 Okay. That will be the ruling, then. And I'll see you
13 Monday, I guess. We're adjourned.

14 THE CLERK: All rise.

15 MR. POMERANTZ: Thank you, Your Honor.

16 MR. RUKAVINA: Thank you.

17 (Proceedings concluded at 12:20 p.m.)

18 --oo--

20 CERTIFICATE

21 I certify that the foregoing is a correct transcript from
22 the electronic sound recording of the proceedings in the
above-entitled matter.

23 /s/ **Kathy Rehling**

03/19/2021

24 _____
25 Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

_____ Date

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